

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

119
14

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1933

No. 6023

416

JOSEPH A. ROTH AND THOMAS F. SWEENEY,
TRUSTEES, APPELLANTS,

vs.

EISINGER MILL AND LUMBER CO., INC., A COR-
PORATION, AND D. SABATINI, TRADING AS D.
SABATINI AND COMPANY.

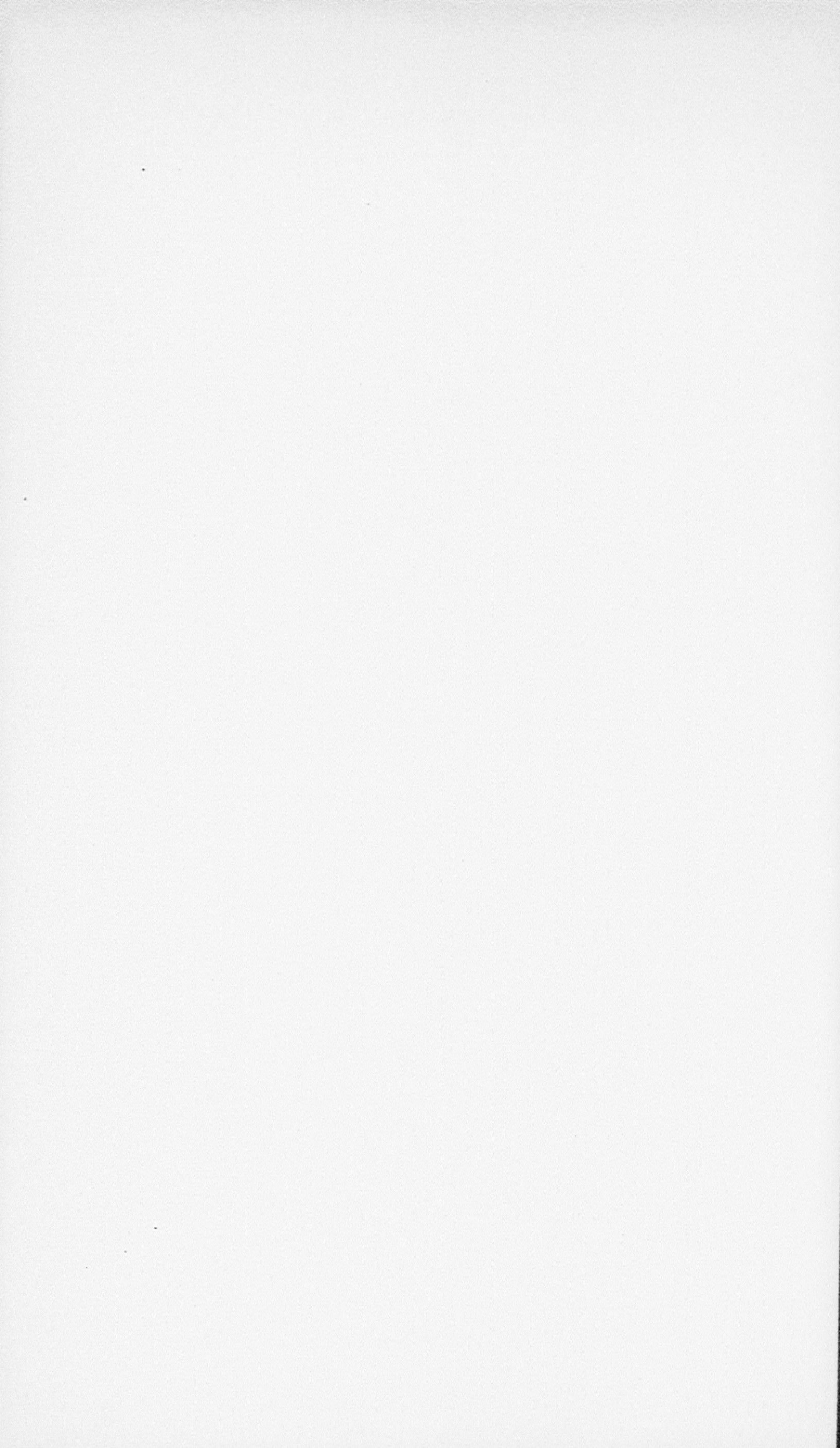
APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JULY 13, 1933.

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Feb. 8, 1934



Court of Appeals of the District of Columbia

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JOSEPH A. ROTH AND THOMAS F. SWEENEY,
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vs.

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PORATION, AND D. SABATINI, TRADING AS D.
SABATINI AND COMPANY, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 6023.

JOSEPH A. ROTH et al., Appellants,

vs.

EISINGER MILL AND LUMBER Co., Inc., &c., et al.

a Supreme Court of the District of Columbia.

Equity. No. 48449.

EISINGER MILL AND LUMBER Co., Inc., and JOSEPH ATWOOD,
August W. Rupprecht and William E. Rupprecht, Trading
as Atwood & Rupprecht, a Partnership, Complainants,

vs.

JOSEPH A. ROTH, THOMAS F. SWEENEY, ADOLPH MEYER,
B. W. Stauffer, D. Sabatini, Trading as D. Sabatini and
Company; James T. Nash, and C. William Schmidt, De-
fendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the
District of Columbia, at the City of Washington, in said
District, at the times hereinafter mentioned, the following
papers were filed and proceedings had in the above-entitled
cause, to wit:

Bill of Complaint.

Filed June 8, 1928.

In the Supreme Court of the District of Columbia, Holding
an Equity Court.

Equity. No. 48449.

EISINGER MILL AND LUMBER Co., INC., and JOSEPH ATWOOD,
August W. Rupprecht and William E. Rupprecht, Trading
as Atwood & Rupprecht, a Partnership, Complainants,

vs.

JOSEPH A. ROTH, THOMAS F. SWEENEY, ADOLPH MEYER,
B. W. Stauffer, D. Sabatini, Trading as D. Sabatini and
Company; James T. Nash, and C. William Schmidt, De-
fendants.

The bill of complaint of the above-named complainants re-
spectfully shows:

First. That the said Eisinger Mill and Lumber Co., Inc.,
is a corporation organized under the laws of the State of
Delaware, and the said Joseph Atwood, August W. Rup-
precht and William E. Rupprecht, trading as Atwood &
Rupprecht, a partnership, are citizens of the United States
and residents of the District of Columbia, and they bring this
suit in their own right as parties entitled to mechanics' liens
against the real estate hereinafter set out, or the net pro-
ceeds arising from the sale thereof, as hereinafter set forth,
and in behalf of others similarly situated who may intervene
herein and contribute to the costs of this suit.

Second. The defendants are all citizens of the
2 United States and residents of the District of Colum-
bia, and are sued as follows:

The defendants, Joseph A. Roth and Thomas F.
Sweeney, as the trustees under a certain deed of trust of
record, hereinafter referred to, and further as the proper
recipients of the net proceeds arising from the sale of the
said property, according to the terms of the said deed of
trust, as more particularly hereinafter described. The de-
fendants, Adolph Meyer and B. W. Stauffer, in their own
right, as the owners of the said real estate and the persons

recited in the said deed of trust as being entitled to the aforesaid net proceeds and hereinafter alleged to have improperly received the same. The other defendants, D. Sabatini, trading as D. Sabatini and Company, James T. Nash, and C. William Schmidt, are made parties hereto in their own right as parties who have filed liens against the said real estate.

Third. That on or about the seventh day of March, 1927, the defendants, Adolph Meyer and B. W. Stauffer, were seized and possessed, in fee simple, of the following described real estate, to-wit:

Lot 50, in Square 1740, in the City of Washington, in the District of Columbia, and so described for purposes of assessment and taxation in the Office of the Surveyor of the District of Columbia.

Fourth. Your complainants further say that the defendants, Adolph Meyer and B. W. Stauffer, by deed of trust dated March 7, 1927, and recorded on or about March 11, 1927, among the land records of the District of Columbia, in Liber 85 at folio 41, et seq., conveyed the above described real estate to Joseph A. Roth and Thomas F. Sweeney, as trustees, to secure Ambrose R. Swan and Harry B. Moore, in the sum of Three Thousand Six Hundred and Fifty Dollars (\$3,650), evidenced by one certain promissory note bearing even date with said deed of trust, in the sum of Three Thousand Six Hundred and Fifty Dollars (\$3,650), payable one year after date, and bearing interest at the rate of six and one-half per centum ($6\frac{1}{2}\%$) per annum.

Fifth. That on or about the 15th day of March, 1927, the said defendants, Adolph Meyer and B. W. Stauffer, desiring to improve the said real estate by erecting and constructing thereon a house to be used for dwelling purposes, and to be known as No. 5204 Forty-first Street, Northwest, began the construction of the said house, and also a house adjacent and to be attached thereto to be known as No. 5206 Forty-first Street, Northwest, to be on Lot 49, in Square 1740, also owned by the said defendants, and the two houses to be semi-detached.

Sixth. That in order to erect and construct the said dwelling houses, the said Adolph Meyer and B. W. Stauffer entered into sundry contracts with divers persons, for ma-

materials to be furnished and labor to be performed in and about the said buildings, among which persons was your complainant, Eisinger Mill and Lumber Co., Inc.

That on or about the 7th day of April, 1927, the said defendants, Adolph Meyer and B. W. Stauffer, entered into a contract with said complainant, Eisinger Mill and Lumber Co., Inc., to furnish and deliver at the said semi-detached buildings to be known as No. 5204 Forty-first Street, Northwest, and No. 5206 Forty-first Street, Northwest, both on property then owned by the said defendants, as aforesaid, certain mill work, glass and stair material required for the same, according to plans and specifications exhibited
4 to the said complainant by the said owners and builders, at and for the sum of One Thousand and Nineteen Dollars (\$1,019), to be paid by the said Adolph Meyer and B. W. Stauffer, all of which will more particularly appear by reference to the said contract, which is hereto attached, marked "Complainants' Exhibit A", and is prayed to be read at the hearing hereof. Said complainant also furnished and delivered at the said buildings certain extra mill work and other materials upon the order of the said defendants, Adolph Meyer and B. W. Stauffer, for the additional price of Three Hundred Twenty-seven Dollars and Fifty Cents (\$327.50), which price was agreed upon by the said Adolph Meyer and B. W. Stauffer, making the total amount due said complainant for the said material and work, the sum of One Thousand Three Hundred Forty-six Dollars and Fifty Cents (\$1,346.50); that the said complainant, upon the order of the said Adolph Meyer and B. W. Stauffer, further furnished and delivered at the said buildings certain lumber, at and for the sum of One Thousand Seven Hundred Ninety-eight Dollars and Eighty-four Cents (\$1,798.84), and the prices comprising the said aggregate total were agreed upon by the said Adolph Meyer and B. W. Stauffer, making the grand total amount due the said complainant from the said defendants, the sum of Three Thousand One Hundred Forty-five Dollars and Thirty-four Cents (\$3,145.34).

That your said complainant has furnished the said mill work, and other materials, in accordance with the terms of the said written contract, and also the extra items of mill work, materials and lumber as aforesaid, for the said attached buildings, and the said materials were actually de-

livered at and used in and about the construction of
5 the said buildings erected and attached as aforesaid,
but neither of the said defendants, Adolph Meyer or
B. W. Stauffer, nor anyone for either or both of them, has
paid said complainant for said materials, except the sum
of One Thousand Two Hundred and Fifty Dollars (\$1,250),
which was paid in cash in instalments of One Hundred and
Fifty Dollars (\$150), Three Hundred and Fifty Dollars
(\$350), Two Hundred and Fifty Dollars (\$250), Two Hun-
dred Dollars (\$200), and Three Hundred Dollars (\$300),
on the respective date of April 30, May 10, May 24, May 31,
and June 14, 1927, thereby leaving a balance of One Thou-
sand Eight Hundred Ninety-five Dollars and Thirty-four
Cents (\$1,895.34), together with interest thereon from June
27, 1927, as claimed, still due and owing to your said com-
plainant, no part of which said sum of One Thousand Eight
Hundred Ninety-five Dollars and Thirty-four Cents
(\$1,895.34), has been paid to your said complainant, although
demand has been made on the said defendants, Adolph
Meyer and B. W. Stauffer, therefor.

That by reason of the premises and of the non-payment
of the said sum of One Thousand Eight Hundred Ninety-
five Dollars and Thirty-four Cents (\$1,895.34), the com-
plainant, Eisinger Mill and Lumber Co., Inc., became en-
titled to the lien created and provided by Act of Congress
in such cases made and provided, and on or about the 15th
day of September, 1927, within the time prescribed by law
and before the completion of the said building, No. 5204
Forty-first Street, Northwest, it filed in the Office of the
Clerk of the Supreme Court of the District of Columbia a
notice, in writing, of its intention to hold a mechanics' lien
upon the aforesaid real estate described as Lot 50 in Square
1740, and the building thereon, which is known as
6 No. 5204 Forty-first Street, Northwest, for the sum of
One Thousand Eight Hundred Ninety-five Dollars and
Thirty-four Cents (\$1,895.34), with interest thereon from
June 27, 1927, being the amount due it as aforesaid for the
said mill work, lumber, and materials furnished for the con-
struction of the said buildings under and by virtue of a con-
tract with the said Adolph Meyer and B. W. Stauffer; said
notice of lien being recorded in Mechanics' Lien Book No.
15, at page 256, in said Clerk's Office, and numbered 10511,
a copy whereof is hereto attached marked "Complainants'

Exhibit B'', and it is prayed that it be read and considered as a part hereof.

Seventh. That in order to erect and construct said building No. 5204 Forty-first Street, Northwest, on the aforesaid real estate, the defendants, Adolph Meyer and B. W. Stauffer, through their agent, one F. Wilcox, entered into a contract with the said complainants, Joseph Atwood, August W. Rupprecht, and William E. Rupprecht, trading as Atwood & Rupprecht, a partnership, on or about the 7th day of July, 1927, to perform certain labor on, and furnish certain materials for, the said building, at and for the sum of One Hundred Sixty-four Dollars and Forty Cents (\$164.40) less a discount in the sum of Thirty-one Dollars and Five Cents (\$31.05), resulting in a net amount of One Hundred Thirty-three Dollars and Thirty-five Cents (\$133.35); that these complainants performed the said labor and furnished the said materials in accordance with their said agreement and the said labor was actually performed on the said building, and the said materials were actually delivered at and used in and about the construction of the said building erected as aforesaid; that

7 neither of the said defendants, Adolph Meyer or B. W. Stauffer, nor any one for either or both of them, has paid said complainants for the aforesaid labor and materials, so that the said sum of One Hundred Thirty-three Dollars and Thirty-five Cents (\$133.35), together with interest thereon from August 18, 1927, as claimed, is still due and owing to said complainants, no part of which has been paid to said complainants, although demand has been made on the defendants, Adolph Meyer and B. W. Stauffer, therefor.

That by reason of the premises and of the non-payment of the aforesaid sum of One Hundred Thirty-three Dollars and Thirty-five Cents (\$133.35), your complainants, Joseph Atwood, August W. Rupprecht, and William E. Rupprecht, trading as Atwood & Rupprecht, a partnership, as aforesaid, being entitled to the lien created and provided by Act of Congress in such cases made and provided, and on or about the 19th day of August, 1927, within the time prescribed by law and before the completion of said building, filed in the Office of the Clerk of the Supreme Court of the District of Columbia, a notice, in writing, of their intention to hold a mechanics' lien upon the aforesaid real estate

and the building thereon, No. 5204 Forty-first Street, Northwest, for the sum of One Hundred Thirty-three Dollars and Thirty-five Cents (\$133.35), being the amount due them, as aforesaid, for labor and materials furnished by them for the construction of the said building under and by virtue of a contract with the said Adolph Meyer and B. W. Stauffer; said notice of lien being duly recorded in Mechanics' Lien Book No. 15, at page 224, and numbered 10448, a copy whereof is hereto attached, marked "Complainants' Exhibit C", and it is prayed that it be considered and read as a part hereof.

Eighth. That before the said building, No. 5204
8 Forty-first Street, Northwest, in process of construction, as aforesaid, was completed, the defendants, Adolph Meyer and B. W. Stauffer, became financially involved to such an extent that they became in default, in meeting certain of the obligations secured by the aforesaid deed of trust of record, to the said Joseph A. Roth and Thomas F. Sweeney, as trustees, and thereafter, on or about the 4th day of November, 1927, and before the said building had been fully completed, said trustees, acting in pursuance of the terms and instructions contained in said deed of trust, made sale of the said property, consisting of the aforesaid lot, Lot 50 in Square 1740, and the improvements thereon, No. 5204 Forty-first Street, Northwest, at public auction to the highest bidder therefor, and the said trustees in due course received the sum of One Thousand One Hundred Eighty-six Dollars and Seventy Cents (\$1,186.70), representing the amount payable unto them as such trustees from the purchaser through a local title company, remaining after full payment and satisfaction of the amounts due from the said defendants and secured by a prior trust of record and also by the deed of trust to such defendant trustees, as hereinbefore described, as well all expenses incidental to the sale and disposition of the property as aforesaid; that the complainant, Eisinger Mill and Lumber Co., Inc., thereafter advised the said title company, which had control and possession of the proceeds arising from said sale, and prior to disposition thereof, of its said claim amounting to One Thousand Eight Hundred Ninety-five Dollars and Thirty-four Cents (\$1,895.34), and appearing in said mechanics' lien notice of record; that said complainants, Eisinger Mill and Lumber Co., Inc.,

thereupon also notified each of the said trustees of their claim by lien, first upon the aforesaid real estate and thereafter upon the proceeds arising from said sale, amounting to One Thousand One Hundred Eighty-six Dollars and Seventy Cents (\$1,186.70), as aforesaid, after payment of the obligations hereinbefore mentioned.

That the said complainants, Joseph Atwood, August W. Rupprecht, and William E. Rupprecht, trading as Atwood & Rupprecht, upon learning of the sale of the said property by foreclosure and the further fact that the sum of One Thousand One Hundred Eighty-six Dollars and Seventy Cents (\$1,186.70), had been delivered by the said title company to the said trustees, caused their attorneys, Messrs. Shefferman & Aronson, to notify personally the co-trustee, Joseph A. Roth, of said complainants' claim by mechanics' lien notice, numbered 10448, as aforesaid, amounting to the sum of One Hundred Thirty-three Dollars and Thirty-five Cents (\$133.35), against said property, and thereafter by a lien upon the net proceeds arising from said sale in the hands of said trustees; and said attorneys notified the said Joseph A. Roth, as co-trustee, prior to disposition thereof by said trustees, that they made claim in behalf of their said clients, these complainants, upon that portion of the said amount in the hands of said trustees necessary to satisfy the claim of One Hundred Thirty-three Dollars and Thirty-five Cents (\$133.35) and interest.

That the said Joseph A. Roth, in spite of such actual and constructive notice to the Title Company and the said trustees, on the part of these complainants, and in defiance of the same, and of the respective claims of the parties to these funds in the hands of the trustees, and in disregard of the notice and without right so to do, paid the same over to the defendants, Adolph Meyer and B. W. Stauffer.

10 *Ninth.* That the defendant, D. Sabatini, trading as D. Sabatini and Company, filed in the Office of the Clerk of the Supreme Court of the District of Columbia a notice, in writing, of his intention to hold a mechanics' lien against the hereinbefore described real estate and the building thereon, No. 5204 Forty-first Street, Northwest, for the sum of One Hundred Dollars, (\$100), with interest thereon

from July 11, 1927, for labor and materials (tile work) furnished in and about the construction of said building, by virtue of a contract with said defendants, Adolph Meyer and B. W. Stauffer, which said notice of lien was filed on or about the 7th day of September, 1927, in Mechanics' Lien Book No. 15, at page 247, in said Clerk's Office, and numbered 10493.

Tenth. That the defendant, James T. Nash, filed in the Office of the Clerk of the Supreme Court of the District of Columbia a notice, in writing, of his intention to hold a mechanics' lien against the hereinbefore described real estate and the building thereon, No. 5204 Forty-first Street, Northwest, for the sum of One Hundred and Seventy-five Dollars, (\$175), for labor and materials (painting) furnished in and about the construction of said building, by virtue of a contract with said defendants, Adolph Meyer and B. W. Stauffer, which said notice of lien was filed on the 10th day of September, 1927, in Mechanics' Lien Book No. 15, at page 252, in said Clerk's Office, and numbered 10503.

Eleventh. That the defendant, C. William Schmidt, filed in the Office of the Clerk of the Supreme Court of the District of Columbia a notice, in writing, of his intention to hold a mechanics' lien against the hereinbefore described real estate and the building thereon, No. 5204 Forty-first
11 Street, Northwest, for the sum of Seven Hundred and Ten Dollars (\$710), with interest thereon from August 1, 1927, for labor and materials (heating and plumbing) furnished in and about the construction of said building, which said notice of lien was filed on the 11th day of October, 1927, in Mechanics' Lien Book No. 15, at page 275, in said Clerk's Office, and numbered 10549.

Twelfth. The complainant, Eisinger Mill and Lumber Co., Inc., and the complainants, Joseph Atwood, August W. Rupprecht, and William E. Rupprecht, trading as Atwood & Rupprecht, a partnership, accordingly respectfully submit to this court that, in view of the premises above outlined, they had a valid and subsisting claim by lien against the aforesaid real estate and duly protected the same by the aforesaid mechanics' lien notices of record; that upon the sale of said property by the trustees acting in exercise of the powers conferred upon them in the aforesaid second deed of trust of record, their aforesaid respective liens thereupon in equity

followed and were transferred to and existed upon the aforesaid fund of, to-wit, One Thousand One Hundred Eighty-six Dollars and Seventy Cents, (\$1,186.70), in the hands of the aforesaid trustees, both of whom had actual as well as constructive notice of the aforesaid lien claims, and claimants are advised that they are entitled to relief against the trustees for having thus wrongfully paid over the said fund of One Thousand One Hundred Eighty-six Dollars and Seventy Cents, (\$1,186.70), and that they are also entitled to have these funds in the hands of the defendants, Adolph Meyer and B. W. Stauffer, impressed with a trust for their benefit and to have the same subjected to the discharge of their respective liens.

12 Wherefore, the premises considered, complainants pray as follows:

1. That process may be issued herein against Joseph A. Roth, Thomas F. Sweeney, Adolph Meyer, B. W. Stauffer, D. Sabatini, trading as D. Sabatini and Company, James T. Nash, and C. William Schmidt, named in the caption of this bill as defendants, whom they pray may be made parties defendants hereto, commanding them and each of them to appear in this honorable court by a day certain, and then and there answer the premises, and to stand to and abide by such order and decree as to this honorable court may seem meet and proper.

2. That the complainants, Eisinger Mill and Lumber Co., Inc., and Joseph Atwood, August W. Rupprecht, and William E. Rupprecht, trading as Atwood & Rupprecht, a partnership, may have a decree against the said Trustees, and that said Trustees be required to account for the aforesaid sum of One Thousand One Hundred Eighty-six Dollars and Seventy Cents, (\$1,186.70), or such other amount as may represent the net proceeds arising from such sale received by the aforesaid Trustees, Joseph A. Roth and Thomas F. Sweeney, and thereafter, wrongfully paid over by them to the aforesaid defendants, Adolph Meyer and B. W. Stauffer, as aforesaid, and to have such proceeds subjected to the payment and satisfaction of the aforesaid lien claims of One Thousand Eight Hundred Ninety-five Dollars and Thirty-four Cents (\$1,895.34), and One Hundred Thirty-three Dollars and Thirty-five Cents, (\$133.35), respectively, with interest thereon, due these complainants for labor and materials, as hereinbefore set forth.

3. That both of these complainants, Eisinger Mill and Lumber Co., Inc., and Atwood & Rupprecht, may have
 13 a decree against the defendant trustees for said funds and interest thereon for having wrongfully paid out the same as hereinbefore set forth.

4. That each of your complainants be decreed to have a judgment against the said defendants, Adolph Meyer and B. W. Stauffer for so much of their respective liens as may remain unsatisfied, out of the proceeds of said sale.

5. That complainants may be granted such other and further relief as the nature of the case may seem to require and to the court seem meet and proper.

The defendants to this bill are: Joseph A. Roth, Thomas F. Sweeney, Adolph Meyer, B. W. Stauffer, D. Sabatini, trading as D. Sabatini and Company, James T. Nash, and C. William Schmidt.

EISINGER MILL AND LUMBER CO.,
 INC.,

By WALTER G. EISINGER, [SEAL.]
President & Treasurer.

Attest:

ROGER W. EISINGER,
Secretary.

PEELLE, OGILBY & LESH,
 JEROME F. BARNARD,
*Attys. for Eisinger Mill and
 Lumber Co., Inc.*

ATWOOD & RUPPRECHT,
 By JOSEPH ATWOOD.

ABE SHEFFERMAN &
 M. H. ARONSON,
Attys. for Atwood & Rupprecht.

DISTRICT OF COLUMBIA, ss:

Walter G. Eisinger, being first duly sworn, on oath, deposes and says that he has read the foregoing Bill of Complaint by him subscribed in the name and behalf of Eisinger Mill and Lumber Co., Inc., and that he knows the contents thereof; that the matters and things therein stated
 14 upon his personal knowledge are true, and those therein stated upon information and belief, he believes to be true.

WALTER G. EISINGER.

Subscribed and sworn to before me this 30 day of April, 1928.

[NOTARIAL SEAL.] KENNETH J. WINFIELD,
Notary Public, D. C.

DISTRICT OF COLUMBIA, ss:

Joseph Atwood, being first duly sworn, on oath, deposes and says that he has read the foregoing Bill of Complaint by him subscribed in the name and behalf of Atwood & Rupprecht, a partnership, and that he knows the contents thereof; that the matters and things therein stated upon his personal knowledge are true, and those therein stated upon information and belief, he believes to be true.

JOSEPH ATWOOD.

Subscribed and sworn to before me this 5th day of June, 1928.

[NOTARIAL SEAL.] DOROTHY M. CONNOR,
Notary Public, D. C.

15 EXHIBIT "A".

W. G. Eisinger, President. W. C. Eisinger, Sec'y and
Treasurer.

Eisinger Mill and Lumber Co., Inc.

Lumber and Mill Work.

Sixth and W Streets Northwest; Bethesda, Md.

Doors, Sash, Blinds, Builders' Hardware, Mouldings.

Telephone: North 1173.

April 7, 1927.

Myer & Stauffer,
1415 I St. N. W.,
Wash., D. C.:

We beg to submit you the sum of Ten hundred and Nineteen dollars for mill work, glass, and stair material required for two semidetached dwellings to be built at 41 & Huntington st. N. W. according to plans and spec.

Oak Tread & Risers—Birch Newel & Rail.

N. C. Trim. & base climax Doors.

N. C. garage Doors.

“ cellar stairs.

“ closet shelving.

“ mantle shelf.

EISINGER MILL & LUMBER CO.
W. G. E.

Accepted Apr. 7/27.

B. W. STAUFFER.

ADOLPH MEYER.

16

EXHIBIT “B”.

Supreme Court, District of Columbia.

Filed and Recorded September 15th, 1927, at 2:44 o'clock
P. M.

No. 10511.

EISINGER LUMBER Co., INC., Claimant,

vs.

ADOLPH MEYER and B. W. STAUFFER, Owner.

Notice of Lien.

Notice is hereby given that we intend to hold a mechanics' lien against the interest of Adolph Meyer and B. W. Stauffer in the land and premises known for taxation purposes as Lot 50 in Square 1740, situate in the City of Washington, in the District of Columbia, and the building thereon, for the sum of Eighteen Hundred and Ninety-Five and 34/100 Dollars (\$1,895.31), with interest from June 27", 1927, being amount due to us for materials (lumber and millwork) furnished for the construction of said building under and by virtue of a contract with the said Adolph Meyer and B. W. Stauffer.

EISINGER MILL AND LUMBER CO.,
INC., *Claimant,*
By W. G. EISINGER, *Pres.*

Filed and Recorded Aug. 19, 1927, at 12 o'clock M., L. B. —,
Page —.

Supreme Court, District of Columbia.

No. 10448.

JOSEPH ATWOOD & W. E. RUPPRECHT, Trading as Atwood &
Rupprecht, Claimant-,

vs.

ADOLPH MEYER & B. W. STAUFFER, Owner-.

Notice of Lien.

Notice is hereby given that we intend to hold a mechanics' lien against the interest of Adolph Meyer and B. W. Stauffer in lots 49 and 50, Square 1740, also known as 5204 41 St. N. W., situate in the City of Washington, in the District of Columbia, and the building thereon, for the sum of One Hundred & Thirty Three 35/100 Dollars (\$133.35), with interest from Aug. 18, 1927, being amount due to them for labor upon the materials furnished for the construction of said building under and by virtue of a contract with owner through N. Wilcox, agent of owner.

ATWOOD & RUPPRECHT,

Claimant,

By SHEFFERMAN & ARONSON,

Attys.

[Endorsed:] No. 10448. Mechanics' Lien. Atwood & Rupprecht vs. Meyer & Stauffer.

18 *Answer of Joseph A. Roth and Thomas F. Sweeney,
Trustees.*

Filed July 6, 1928.

* * * * *

The answer of Joseph A. Roth and Thomas F. Sweeney, Trustees, to the bill of complaint in this cause exhibited by

the Eisinger Mill and Lumber Co., Inc., and others against these and other defendants respectfully says:

1. These defendants are without personal knowledge, but for the purposes of this suit, admit the citizenship and residence of the persons named as plaintiffs. These defendants do not admit, but, on the contrary, expressly deny that plaintiffs Eisinger Mill and Lumber Co., Inc., Joseph Atwood, August W. Rupprecht and William E. Rupprecht are entitled, as against these defendants, to net proceeds arising from the sale of the real estate described in the third paragraph of the bill of complaint.

2. These defendants, for the purposes of this suit, admit the citizenship, residence, and capacities in which they are sued, and of the persons named as defendants in this suit, although these defendants are for the most part without personal knowledge thereof. These defendants deny the recital in said second paragraph that the surplus proceeds of the fund arising from a sale under a certain deed of trust was improperly received by certain other defendants.

3, 4. These defendants, for the purposes of this suit, admit the averments of the third and fourth paragraphs.

5. These defendants are without personal knowledge as to the averments of the fifth paragraph, and if the same become material to this cause, they pray for strict proof of said averments.

19 6. These defendants are without personal knowledge as to the averments of the sixth paragraph, except that on or about the 14th day of December 1927 they learned that a mechanic's lien had been filed. Should the allegations in said sixth paragraph become material to this cause as affecting these defendants, they pray for strict proof of the allegations thereof.

7. These defendants are without personal knowledge as to the averments of the seventh paragraph, and pray for strict proof thereof.

8. Answering the eighth paragraph, these defendants had and have no knowledge as to the financial condition of the defendants Meyer and Stauffer. These defendants state that pursuant to a demand from the holder of the promissory note secured under said deed of trust mentioned in the fourth paragraph of plaintiffs' bill, these defendants, as Trustees, duly advertised for sale at public auction, and on or about the 4th day of November 1927, sold to the

highest bidder the premises being Lot Fifty (50) in Square Seventeen Hundred and Forty (1740). These defendants admit receiving from a local Title Company the sum of \$1,186.70 as the surplus fund remaining after the payment of proper charges against the proceeds of the sale of said real estate. These defendants have no knowledge whether or not the plaintiff Eisinger advised said Title Company of its alleged claim to said surplus fund. These defendants deny that the plaintiff Eisinger notified them, or either of them, of its alleged claim. These defendants state that sometime in November 1927 some person representing himself as the attorney for the plaintiff Eisinger, but declining

20 to disclose his name, called upon and inquired of the defendant Roth whether or not the defendant Roth had received any money from the sale of said property. That these Trustees had not then received any money, and then and there defendant Roth stated to said unknown person that under and by virtue of the terms of the said deed of trust, the Trustees would be compelled to turn over to Adolph Meyer and B. W. Stauffer any surplus proceeds of the sale unless legal proceedings were instituted to prevent the same. That a representative of plaintiff Eisinger Mill and Lumber Co., Inc., to wit, Mr. Eisinger, Jr., was present at the sale of said property and bid on the same.

These defendants have no knowledge as to the claim of plaintiffs Atwood and Rupprecht, co-partners, but state that shortly after said sale in November, 1927, Messrs. Shefferman and Aronson called upon defendant Roth, who told said Shefferman and Aronson that the Trustees would be compelled to turn the surplus proceeds of sale which would come into their hands over to defendants Meyer and Stauffer, unless some legal action was taken to prevent the same.

The defendant Roth has no knowledge as to whether the Title Company had either actual or constructive notice, or both, and denies that the Trustees had either actual or constructive notice of any claim.

These defendants deny that they had either actual or constructive notice of any lien or claim of the plaintiffs except as above stated, and deny that any action on their part was without right, but, on the contrary, they state that they proceeded in the execution of their duty as Trustees with a due regard of the terms and powers contained in the

21 deed of trust under which they acted, and the terms of which said deed of trust limited and directed them how they should proceed, and that they were not at liberty to proceed otherwise or at variance therewith. That under the terms of said trust, to which said trust reference is hereby made, these defendants as Trustees were in duty bound to turn the surplus of any proceeds of sale over to defendants Meyer and Stauffer. These Trustees aver that the first notice of said sale appeared in the Evening Star newspaper on, to wit, the evening of October 24th, 1927, and that they turned over said proceeds of sale unto defendants Meyer and Stauffer, as they were in duty bound to do, on or about the 14th day of December, 1927. That during the interval of time between the advertisement of the property for sale and the turning over of the proceeds to the defendants Meyer and Stauffer, the plaintiffs, nor any of them, did not, so far as known to these defendants, take any step to enforce their claim.

9, 10, 11. These defendants have no knowledge of the averments of the ninth, tenth and eleventh paragraphs, and pray for strict proof thereof.

12. These defendants deny that the plaintiff Eisinger and that plaintiffs Atwood and Rupprecht have or had a valid and subsisting claim by lien or any claim against the aforesaid real estate having priority to the deed of trust aforesaid or to the proceeds realized upon the sale of the real estate under said deed of trust, and these defendants deny that such alleged claim was duly protected by the said mechanic's lien notice.

These defendants deny that upon the sale of the said property by the Trustees that the alleged liens upon the real estate in equity followed and were transferred to and
22 existed upon the proceeds realized from said sale in the hands of these defendants as Trustees. These defendants deny that they or either of them had actual notice of the aforesaid liens and they deny that they had constructive notice of the aforesaid liens, and they aver that, whether they had actual or constructive notice of said liens, they were in duty bound to proceed under the terms of the deed of trust under which they were appointed, and that the provisions of said deed of trust were paramount to the filing of a notice of the lien in the Office of the Clerk

of the Supreme Court of the District of Columbia. These defendants deny that the plaintiffs or any of them are entitled to any relief against these defendants as Trustees and these defendants deny that they wrongfully paid over said fund of \$1,186.70, but, on the contrary, assert that they paid over said sum rightfully and with due regard to, and in proper performance of, their duty as Trustees. These defendants state that whether or not the plaintiffs are entitled to have the funds in the hands of the defendants Meyer and Stauffer impressed with a trust for the benefit of the plaintiffs does not call for a response from these defendants.

And for a further answer to the bill of complaint, these defendants say that there is a plain, adequate and complete remedy at law as against these defendants for any supposed grievance, and that the matters and things averred in the bill of complaint as against these defendant are not cognizable in equity, and that the bill of complaint does not state a cause of action against these defendants within the jurisdiction of the equity court.

23 And now having fully answered, these defendants pray to be hence dismissed with their costs.

THOMAS F. SWEENEY,
JOSEPH A. ROTH,
Defendants.

WALTER C. ENGLISH,
*Attorney for Defendants, Joseph A.
Roth and Thomas F. Sweeney.*

DISTRICT OF COLUMBIA, ss:

We, — — —, being first duly sworn, depose and say that *I am one of* the defendants in the above entitled cause; that *I* have read the foregoing answer by *me* subscribed and know the contents thereof; and that *I* verily believe the facts therein stated to be true.

JOSEPH A. ROTH.
THOMAS F. SWEENEY.

Subscribed and sworn to before me this 3rd day of July,
A. D., 1928.

[NOTARIAL SEAL.] MARGARET M. MURRAY,
Notary Public, D. C.

Memoranda.

July 10, 1928.—Order pro confesso against Adolph Meyer, filed.

May 26, 1931.—Order pro confesso against C. William Schmidt, filed.

24 *Answer of D. Sabatini, Trading as D. Sabatini and Company.*

Filed November 10, 1931.

* * * * * *

The Answer of D. Sabatini trading as D. Sabatini and Company to the Bill of Complaint filed herein respectfully represents to the Court as follows:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12: Answering paragraphs one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve, this Defendant states that he is informed and believes and therefore avers the truth of the allegations set forth in said paragraphs and therefore admits the same. Answering further said Bill of Complaint this Defendant says that in accordance with his contract with the Defendants Adolph Meyer and B. W. Stauffer he furnished labor and materials (tile work) in and about the building mentioned in said Bill of Complaint; that the price therefor was \$100 which has not been paid and he has a valid and subsisting lien against the aforesaid real estate and duly protected same by filing a notice of holding mechanics lien thereon.

Wherefore he prays that the Trustees be required to account for the net proceeds arising from the sale of said property and to have such proceeds subjected to the payment and satisfaction of his aforesaid lien with interest thereon from July 11, 1927, and that he may have a decree against the Defendant Trustees for said funds and interest thereon for having wrongfully paid out the same, as set forth in the Bill of Complaint; and that this Defendant be decreed to have a judgment against the Defendants Adolph Meyer and B. W. Stauffer for so much of his lien as may remain unsatisfied.

25 And, having fully answered, he prays that he may be hence dismissed, with his reasonable costs and Attorney's fee in this suit sustained.

D. SABATINI,
Trading as D. Sabatini and Co.,
Defendant.

ALBERT D. ESHER,
Attorney for Defendant.

DISTRICT OF COLUMBIA, ss:

Personally appeared before the undersigned a Notary Public in and for the District aforesaid, D. Sabatini, who being on oath, duly sworn, deposes and says that he trades as D. Sabatini and Company and has read the foregoing Answer by him subscribed and knows the contents thereof; that the matters and facts therein stated of his own knowledge are true and those therein stated upon information and belief, he believes to be true.

D. SABATINI.

Subscribed and sworn to before me this — day of November, 1931.

[SEAL.]

NORA M. GAINEY,
Notary Public, D. C.

Memoranda.

April 8, 1932.—Order pro confesso against B. W. Stauffer filed.

April 13, 1932.—Order pro confesso against James T. Nash filed.

26 *Motion to Transfer Cause from Equity to Law.*

Filed June 15, 1932.

* * * * *

Now comes the defendant, Thomas F. Sweeney, by his attorneys, and moves the court to transfer the above entitled cause from the equity term of court to the circuit term of court for the following among other reasons:

1. The action as set forth in the Bill of Complaint states a cause of action which should be heard by the court holding a law term.

2. The Bill of Complaint shows on its face that plaintiffs have a plain, adequate, complete remedy at law.

3. For such other and further reasons as appear on the face of the record.

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Defendant Sweeney.

Messrs. Peelle, Ogilby and Lesh,
1422 F. Street N. W.,
Washington, D. C.

SIRS:

Please take notice that if you wish to oppose the above motion you should comply with Section 5 of Law Rule 32.

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Defendant Sweeney.

Service of Motion and Memorandum acknowledged this 15th day of June, 1932.

PEELLE, OGILBY & LESH.
JEROME F. BARNARD.

27

Memoranda.

June 15, 1932.—Memorandum of Authorities in Support of Motion to Transfer Cause from Equity to Law filed.

June 21, 1932.—Memorandum of Authorities in Support of Opposition to Motion to Transfer Cause from Equity to Law filed.

Order Overruling Motion to Transfer Cause.

Filed October 20, 1932.

* * * * *

Upon consideration of the motion of the defendant Sweeney to transfer the above entitled cause to the law side of the court and after argument thereupon heard in open court, it is by the court this 18th day of October, 1932,

Ordered and decreed that the said motion be, and the same is hereby, denied.

JESSE C. ADKINS,
Justice.

Findings of Fact and Conclusions of Law.

Filed April 10, 1933.

* * * * *

Upon hearing of this cause at this term upon the pleadings and testimony, and having been considered by the Court,

The Court's findings of fact are as follows:

1. That the Eisinger Mill & Lumber Co., Inc., one of the plaintiffs herein, is a corporation organized under the laws of the State of Delaware, and doing business in the District of Columbia, and elsewhere.

28 2. That its business is to furnish lumber, mill work, and other materials used in the erection of improvements upon real estate.

3. That on or about the 7th day of March, 1927, the defendants, Adolph Meyer and B. W. Stauffer, were the owners of record of Lot 50, in Square 1740, in the City of Washington, in the District of Columbia, and so described for purposes of assessment and taxation in the Office of the Surveyor of the District of Columbia.

4. That the said defendants, Adolph Meyer and B. W. Stauffer, by deed of trust dated March 7, 1927, and recorded on or about March 11, 1927, among the land records of the District of Columbia, conveyed the said real estate to the defendants, Joseph A. Roth and Thomas F. Sweeney, as Trustees, to secure Ambrose R. Swann and Harry B. Moore, in the sum of \$3,650, evidenced by one certain promissory note bearing even date with said deed of trust, in the sum of \$3,650, payable one year after date, and bearing interest at the rate of 6½% per annum.

5. That on or about the 15th day of March, 1927, the said defendants, Adolph Meyer and B. W. Stauffer, began the construction of a dwelling house to improve the said real estate, to be known as No. 5204 41st Street, N. W., and also a dwelling house adjacent and to be attached thereto and to be known as No. 5206 41st Street, N. W., and to be on Lot 49, in Square 1740, also owned by the said defendants.

6. That in order to erect and construct the said dwelling houses, the said defendants, Adolph Meyer and B. W. Stauffer, on or about the 7th day of April, 1927, entered

into a contract with said plaintiff, Eisinger Mill & Lumber Co., Inc., to furnish and deliver at the said semi-detached buildings, certain mill work, glass and stair material required for the same, at and for the sum of \$1,019, to be paid to the said plaintiff, by the said defendants, 29 in accordance with the written contract between them. That said plaintiff also furnished and delivered at the said buildings certain extra mill work and other materials upon the order of the said defendants, Adolph Meyer and B. W. Stauffer, for the additional price of \$327.50, which price was agreed upon by the said defendants; and that the said plaintiff, upon the order of the said defendants, further furnished and delivered at the said buildings, certain lumber, at and for the sum of \$1,798.84, that the prices comprising the said total were agreed upon by the said defendants, and that the grand total amount due therefor to the said plaintiff, Eisinger Mill & Lumber Co., Inc., from the said defendants, Adolph Meyer and B. W. Stauffer, was in the sum of \$3,145.34.

7. That the said plaintiff furnished the said mill work, and other materials, in accordance with the terms of the said written contract, and also the extra items of mill work, materials and lumber, as aforesaid, for the said attached buildings, and the said materials were actually delivered at, and used in and about the construction of the said buildings erected and attached as aforesaid. That the said defendants, Adolph Meyer and B. W. Stauffer paid to the said plaintiff, from time to time, various sums of money aggregating \$1,250, on account of the aforesaid total obligation of \$3,145.34, leaving a balance of \$1,895.34, all as set forth in paragraph sixth of the Bill of Complaint filed herein, together with interest thereon from June 27, 1927, still due and owing to the said plaintiff, no part of which has been paid to it.

8. That the plaintiff, Eisinger Mill and Lumber Co., Inc., became entitled to the lien created and provided by Act of Congress in such cases made and provided, and on or about the 15th day of September, 1927, within the time prescribed by law, and before the completion of the said building known as No. 5204 41st Street, N. W., it filed in 30 the Office of the Clerk of the Supreme Court of the District of Columbia, a notice, in writing, of its in-

tention to hold a mechanic's lien upon the aforesaid real estate described as Lot No. 50, in Square 1740, and the building thereon, which is known as No. 5204 41st Street, N. W., for the sum of \$1,895.34, with interest thereon from June 27, 1927, being the amount due it, as aforesaid, for the said mill work, lumber and material furnished for the construction of the said buildings, and that said notice of lien was duly recorded in mechanics' lien book No. 15, at page 256, in said Clerk's Office, and numbered 10511.

9. That the defendant, D. Sabatini, trading as D. Sabatini & Company, entered into a contract with said defendants, Adolph Meyer and B. W. Stauffer, to perform certain labor on, and furnish certain materials (tile work) for, the said buildings, for the sum of \$100, in connection with the construction of the said building, and that the said defendant, D. Sabatini, trading as D. Sabatini & Company, performed the said labor, and furnished the said materials, in accordance with his said agreement, that said labor was actually performed on the said buildings and the said materials were actually delivered at, and used in and about the construction of the said buildings erected as aforesaid; that no payment has been made to the said defendant of the said sum of \$100, or any part thereof, for the aforesaid labor and materials, and that there is still due and owing to him the said sum of \$100, with interest thereon from July 11, 1927. That the said defendant, D. Sabatini, trading as D. Sabatini & Company, being entitled to the lien created and provided by Act of Congress in such cases, made and provided, on or about the 7th day of September, 1927, within the time prescribed by law, and before the completion of the said building, filed in the Office of the

31 Clerk for the Supreme Court of the District of Columbia, a notice, in writing, of his intention to hold a mechanic's lien upon the aforesaid real estate and the building thereon, known as No. 5204 41st Street, N. W., for the said sum of \$100, with interest thereon from July 11, 1927, and said notice of lien was duly recorded in mechanics' lien book No. 15, at page 247, in said Clerk's Office, and numbered 10493.

10. That before the said building, known as No. 5204 41st Street, N. W., had been fully completed, the said defendant trustees, Joseph A. Roth and Thomas F. Sweeney, sold the aforesaid Lot No. 50, in Square 1740, and the improve-

ments thereon known as No. 5204 41st Street, N. W., by foreclosure under the *the* said deed of trust, at public auction, to the highest bidder therefor, and the said trustees received the sum of \$1,180.76, representing the net amount payable to them as such trustees, from the purchaser, through the Real Estate and Columbia Title Insurance Companies, after full payment and satisfaction of the amounts secured by prior trusts of record, including the aforesaid deed of trust to the defendant trustees; that said plaintiff, Eisinger Mill & Lumber Co., Inc., thereupon, and while the aforesaid fund of \$1,180.76 was in the hands of the said defendant trustees, notified each of them of its aforesaid claim by lien, first upon the aforesaid real estate, and thereafter upon the net proceeds arising from said sale, amounting to the said sum of \$1,180.76, which said lien was at said time, valid and outstanding and unreleased; that the said defendant trustees, in spite of such actual and constructive notice to them, on the part of the said plaintiff and in defiance of the same, and of the aforesaid lien claim of record of the said defendant, D. Sabatini, trading as D. Sabatini & Company, against the said fund in the hands of the trustees, and in disregard of such notice to them, paid the said fund of \$1,180.76 to the said defendants, Adolph Meyer and B. W. Stauffer, on December 14, 1927.

32 11. That the Bill of Complaint was filed herein within the time prescribed by law.

The Court's conclusions of law are as follows:

1. That the filing by said plaintiff, Eisinger Mill & Lumber Co., Inc., and said defendant, D. Sabatini, trading as D. Sabatini and Company, of notices of mechanics' liens was in fact as effective as a lien, if filed within the period required by the statute, and until the expiration of the time provided within which to institute proceedings to enforce the same, and, until then, duly preserved said liens against the real estate involved herein, subject only to prior encumbrances, judgments or liens of record; or against the net proceeds arising from its sale, subject only to such prior encumbrances, judgments or liens of record.

2. That upon the sale of the said property by the trustees under the aforesaid second deed of trust secured thereon the said respective liens of the said plaintiff and

said defendant thereupon in equity followed and were transferred to and existed upon the aforesaid fund of \$1,180.76, in the hands of the said trustees, Joseph A. Roth and Thomas F. Sweeney, and that they are personally liable therefor.

3. That said liens could be enforced in the circumstances shown herein upon both of the properties described in the Bill of Complaint filed herein or upon either of such properties.

4. That the said lien claims are prior and superior to the title or interest of all of the other parties to this suit and all of the persons claiming by, through or under said other parties in and to the said sum of \$1,180.76.

5. That the said plaintiff, Eisinger Mill and Lumber Co., Inc., and the said defendant, D. Sabatini, trading as D. Sabatini and Company, are entitled to decrees herein in the nature of money judgments, against the said defend-

33 ants, Joseph A. Roth and Thomas F. Sweeney, in the amount of \$1,121.71, with interest thereon from December 14, 1927, besides the costs of this suit, for the said plaintiff, and in the amount of \$59.05, with interest thereon from December 14, 1927, for the defendant, D. Sabatini, trading as D. Sabatini and Company.

6. That the said plaintiff, Eisinger Mill and Lumber Co., Inc., and the said defendant, D. Sabatini, trading as D. Sabatini and Company, are entitled to decrees herein in the nature of money judgments, against the defendants, Adolph Meyer and B. W. Stauffer, in the amount of \$1,895.34, with interest thereon from June 27, 1927, besides costs of this suit, for the said plaintiff, and in the amount of \$100, with interest thereon from July 11, 1927, for the defendant, D. Sabatini, trading as D. Sabatini and Company, provided, however, that the payment of the judgments provided for in the next above paragraph five, shall operate as a pro tanto satisfaction of the judgments provided for in this paragraph.

PEYTON GORDON,
Justice.

Decree.

Filed April 10, 1933.

* * * * *

This cause having come on to be heard at this term upon the Bill of Complaint, the answers thereto of the defend-

ants, Joseph A. Roth, Thomas F. Sweeney and D. Sabatini and Company, and the testimony of witnesses taken in open Court, and the same having been argued by counsel and considered by the Court, and the Court having made its findings of fact and conclusions of law; It is, thereupon, this 10th day of April, 1933, by the Court,

Adjudged, ordered, and decreed as follows:

34 1. That the orders *pro confesso* heretofore entered herein against the defendant, Adolph Meyer, on the 19th day of July, 1928, the defendant, C. William Schmidt, on the 26th day of May, 1931, the defendant, B. W. Stauffer, on the 8th day of April, 1932, and the defendant James T. Nash, on the 13th day of April, 1932, be, and the same are hereby, made absolute and final.

2. That, on motion of Abe Shefferman and M. H. Aronson, as counsel of record for the plaintiffs, Joseph Atwood, August W. Rupprecht and William E. Rupprecht, trading as Atwood & Rupprecht, a partnership, made in open Court at the hearing of this cause, the Bill of Complaint, as to such plaintiffs only, be, and the same is hereby dismissed.

3. That judgment be, and the same hereby is, entered in favor of the plaintiff, Eisinger Mill and Lumber Co., Inc., against the defendants, Joseph A. Roth and Thomas F. Sweeney, in amount of \$1,121.71, with interest thereon from December 14, 1927, besides the costs of this suit; and that judgment be, and the same hereby is, entered in favor of the defendant, D. Sabatini, trading as D. Sabatini and Company, against the defendants, Joseph A. Roth and Thomas F. Sweeney, in amount of \$59.05, with interest thereon from December 14, 1927.

4. That judgments be, and the same hereby are, entered in favor of the plaintiff, Eisinger Mill and Lumber Co., Inc., and the defendant, D. Sabatini, trading as D. Sabatini and Company, in the respective amounts of \$1,895.34, with interest therein from June 27, 1927, besides costs of this suit, for the said plaintiff, and \$100, with interest thereon from July 11, 1927, for the said defendant, against the defendants, Adolph Meyer and B. W. Stauffer; provided, however, that the payment of the judgments set forth in paragraph three of this decree, shall operate as a pro

35 tanto satisfaction of the judgments set forth in this paragraph; and upon such payment by said Joseph A. Roth and Thomas F. Sweeney, or either of them,

they or either of them so paying, shall, to the extent of such payment, after the entire satisfaction of these judgments against the defendants, Adolph Meyer and B. W. Stauffer, be entitled to be subrogated to the rights herein of the plaintiff, and the defendant, D. Sabatini, trading as D. Sabatini and Company, against said Adolph Meyer and B. W. Stauffer.

5. That the said plaintiff and defendant have execution on all of the aforesaid judgments as at law.

PEYTON GORDON,
Justice.

Approved as to form.

WALTER C. ENGLISH,
Attorney for Defendant Joseph A. Roth.

JOHN H. BURNETT,
Attorney for Defendant Thomas F. Sweeney.

From the foregoing decree, the defendants, Joseph A. Roth and Thomas F. Sweeney, in open Court, note an appeal to the Court of Appeals and the undertaking for costs on appeal is fixed at One Hundred Dollars (\$100), or in lieu thereof, a cash deposit of Fifty Dollars (\$50) with the Clerk.

PEYTON GORDON,
Justice.

Memoranda.

May 2, 1933.—Bond of Thomas F. Sweeney and Joseph A. Roth approved and filed.

May 22, 1933.—Statement of Evidence filed.

36

Assignments of Error.

Filed June 29, 1933.

* * * * *

The Court erred:

1. In denying defendant Sweeney's motion to transfer this action to the circuit term of court.

2. In refusing to dismiss plaintiff's bill on motion made by defendants Roth and Sweeney when plaintiff elected to stand upon the bill of complaint as a bill for accounting in the nature of a bill to enforce a mechanic's lien.

3. In refusing to dismiss the bill of complaint at the close of all of the testimony.
4. In signing the findings of fact and findings of law.
5. In signing the final decree.

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Defendant Sweeney.
WALTER ENGLISH,
Attorney for Defendant Roth.

Memorandum.

June 29, 1933.—Statement of Evidence signed (duplicate)—Gordon, J.—filed.

37

Designation of Record.

Filed April 26, 1933.

* * * * *

The clerk will please include in the Transcript of Record on appeal in the above entitled cause the following:

1. Bill of Complaint.
2. Answers of defendants Roth and Sweeney.
3. Answer of D. Sabatini.
4. Memo.: Orders Pro Confesso.
5. Motion to transfer cause to law side of court.
6. Memo.: Points and Authorities for and against said Motion filed.
7. Order denying Motion to Transfer.
8. Findings of Fact and Conclusions of Law.
9. Final Decree.
10. Assignments of Error.
11. This Designation.
12. Statement of Evidence.

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Defendant Sweeney.
WALTER C. ENGLISH,
Attorney for Defendant Roth.

38 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 37, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 48449 in Equity, wherein Eisinger Mill and Lumber Co. Inc., et al. are Complainants and Joseph A. Roth et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 12th day of July, 1933.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

39 Submitted June 16, 1933.

In the Supreme Court of the District of Columbia.

Equity. No. 48449.

EISINGER MILL AND LUMBER COMPANY, INC., et al., Plaintiffs,
VS.

THOMAS F. SWEENEY, JOSEPH A. ROTH, D. SABATINI,
Trading as D. Sabatini & Company, Defendants.

Statement of Evidence.

Be it remembered that the above entitled cause came on for hearing on the 18th, 19th and 20th days of October, 1932, before Honorable Peyton Gordon, associate justice of the Supreme Court of the District of Columbia, holding an equity term.

That Jerome Barnard, Esquire, appeared on behalf of plaintiff, Eisinger Mill & Lumber Company, and John H.

Burnett, Esquire, appeared on behalf of the defendant Sweeney, and Walter C. English, Esquire, appeared on behalf of the defendant, Roth, and Albert D. Esher, Esquire, appeared on behalf of the defendant, Sabatini; that the following proceedings were had:

The defendant Sweeney and Roth moved the Court to require the plaintiff to elect, and to state upon, what ground it sought relief, namely, whether plaintiff sought relief by way of account; or by bill for enforcing a mechanic's lien; whereupon, plaintiff elected to stand upon the bill as a bill for accounting in the nature of a bill to enforce a mechanic's lien; whereupon, said defendants moved the Court for dismissal of the above action on the ground that plaintiff was not entitled to relief upon such ground and upon the bill of complaint; said motion was by the Court overruled and said defendants excepted thereto on the ground that the action stated in said bill was not an action for accounting cognizable by this Court and was not a
40 bill to enforce a mechanic's lien as required by the law of the District of Columbia; and, on the further ground that Meyer and Stauffer were not sued as individuals, partners, association or corporation.

That then and thereupon the plaintiff, to maintain the issues on its part joined, called **Abe Shefferman**, who testified substantially as follows:

That he is a member of the bar of this Court and attorney for plaintiffs Atwood and Rupprecht; that in October, 1927, he talked to the defendant, Roth, about the judgment of Atwood and Rupprecht against Meyer and Stauffer; that he had obtained a judgment against defendant Meyer for Atwood and Rupprecht in the Municipal Court of this District; he told the defendant Roth that he had filed a mechanic's lien on behalf of Atwood and Rupprecht and asked Roth for settlement of the same out of the funds of the sale of the property belonging to Meyer and Stauffer; that the same was not paid; that Roth stated that Shefferman would have to make application to a court of law or equity, otherwise Roth would be compelled to turn the surplus, when obtained, over to Meyer and Stauffer, under the terms of the deed of trust.

That then and thereupon, to further maintain the issues upon its part joined, the plaintiff called as a witness **Mrs. — Eisinger**, who testified substantially as follows:

That the account of Meyer and Stauffer, defendants herein, showed a balance due for materials furnished to premises 5204 and 5206 41st Street, Northwest, in the sum of \$1,895.34.

Whereupon, to further maintain the issues upon its part joined, plaintiff called as a witness **Roger W. Eisinger**, who testified substantially as follows:

41 That he was secretary of plaintiff company; that the balance due plaintiff in the sum of \$1,895.34 had not been paid; that premises 5204 and 5206 41st Street, Northwest, in this city, were owned by Meyer and Stauffer and that they had erected a semi-detached house thereon; that witness identified a written contract with Meyer and Stauffer and the same was properly proved as alleged in the bill of complaint filed herein; that plaintiff furnished to Meyer and Stauffer certain material and received certain payments therefor leaving the above balance due; that the material furnished to both of the above premises could not be identified in either house; that witness did not know what particular material was furnished to either house but that all of the material plaintiff furnished was furnished for and on account of both houses; that plaintiff filed two identical mechanic's liens in this court, one on Lot 49, and one on Lot 50, in Square 1740, in this District; each lien was in the exact amount of the above balance claimed to be due from Meyer and Stauffer; that Lot 49 was Number 5206 and Lot 50 was Number 5204; said notices of liens were admitted in evidence and showed that they were filed upon the respective lots in the amount and in the manner stated aforesaid; that plaintiff signed a release of liens and understood that it was a release of liens on Lot 49; that he was present when Lot 50 was sold at a foreclosure sale and bid it up to within \$100 of the price at which it was sold; that he talked to the defendant Roth on December 12th and asked him if he had any surplus from said sale; that Roth replied that he did not have the money but after witness inquired of Roth what he intended to do when he got the money, Roth stated that he was go-

ing to turn it back to Meyer and Stauffer; that Roth told witness that plaintiff would have to take some action to protect its rights, either in a court of law or equity and would have to attach the surplus in Roth and Sweeney's hands or file a bill in equity therefor, or take whatever legal steps that he saw fit; that witness said he would not do anything but insisted that Roth and Sweeney turn the surplus
42 money over to plaintiff because of the notice of lien that Eisinger Company had filed; that witness talked to Detective Sweeney on December 13 and asked Sweeney what he was going to do about the surplus and Sweeney told him he would leave it up to Roth.

Whereupon it was agreed and stipulated that a United States Marshal for this District served the notice of mechanic's lien filed against said Lot 50 by plaintiff on Roth on December 14 and on Sweeney on December 22.

That then and thereupon plaintiff rested its case.

That it was thereupon stipulated that the partnership of Atwood and Rupprecht were no longer plaintiffs in the above cause and that Eisinger Mill & Lumber Company, Inc., was the sole plaintiff herein.

That then and thereupon, to maintain the issues upon his part joined, the defendant, **Dominic Sabatini**, testified in his own behalf as follows:

That he was one of the defendants named herein and that he traded as D. Sabatini & Company; that he performed work and furnished materials for two house- belonging to Meyer and Stauffer, defendants, herein, located at 5204 and 5206 41st Street, Northwest; that he did not know what work he did on either house; that he filed a notice of mechanic's lien for his claim on both premises, each notice being in the same amount; that he signed a release of liens on premises 5206; that there is still due and owing him the sum of \$100.00 for said work and material; that he had signed a release of liens on one house, said release being the same as is hereafter set forth.

Whereupon said Sabatini rested his case.

That then and thereupon the defendants Roth and Sweeney, in order to maintain the issues upon their part

joined, called as a witness the defendant **Joseph Roth** who testified substantially as follows:

43 That he is an attorney at law and a member of the Bar of this Court; that he has been employed by title companies in this District for a period of eighteen years and had had experience in matters of this kind for that time; that he identified the deed of trust under which he and the defendant Sweeney acted and the same was admitted in evidence; that the deed of trust was duly executed by Adolph Meyer and B. W. Stauffer on March 7, 1927, and provided among other things as follows:

And upon this further trust, upon any default or failure being made in the payment of said note or of any instalment of principal or interest thereon, when and as the same shall become due and payable, or upon default being made in the payment, after demand therefor, of any money advanced as herein provided for, or of any proper cost, charge, commission, or expense in and about the same, then and at any time thereafter the said parties of the second part or the trustees acting in the execution of this trust shall have the power and it shall be their or his duty thereafter to sell, and in case of any default of any purchaser to resell the said described land and premises at public auction, upon such terms and conditions, in such parcels, at such time and place, and after such previous public advertisement as the parties of the second part or the trustees acting in the execution of this trust shall deem advantageous and proper; and to convey the same in fee simple, upon compliance with the terms of sale, to, and at the cost of, the purchaser, or purchasers thereof, who shall not be required to see to the application of the purchase money; and of the proceeds of said sale or sales: Firstly, to pay all proper costs, charges, and expenses, including

44 all fees and costs herein provided for, and all moneys advanced for taxes, insurance, and assessments, with interest thereon as provided herein, and all taxes, general and special, due upon said land and premises at time of sale, and to retain as compensation a commission of five per centum on the amount of said sale or sales; secondly, to pay whatever may then remain unpaid of said note, whether the same shall be due or not, and the interest thereon to date of payment, it being agreed that said note

shall, upon such sale being made before the maturity of said note, be and become immediately due and payable at the election of the holder thereof; and, lastly, to pay the remainder of said proceeds, if any there be, to said parties of the first part, their heirs or assigns, upon the delivery and surrender to the purchaser, his, her or their heirs or assigns, of possession of the premises so as aforesaid sold and conveyed, less the expense, if any, of obtaining possession.

That there was turned over to him and defendant Sweeney the sum of \$1186.70 as surplus from the foreclosure sale of the aforesaid Lot 50; that he turned said sum over to Meyer and Stauffer on the morning of December 14; that he was served by the United States Marshal with a copy of a notice of mechanic's lien filed by plaintiff in the afternoon of the same day; that before he received the said surplus the witness Shefferman and the witness Eisinger asked him to turn over the surplus that he and Sweeney held because of the notices of liens filed by them; that such request was made before the surplus came into the hands of the trustees; that witness refused so to do and stated to Shefferman and Eisinger that they had to compel him so to do by process either in law or in equity because the terms
45 of the trust under which he and Sweeney were acting required him to turn over to the makers of the note any surplus accruing from a foreclosure sale; that unless he turned the surplus over to Meyer and Stauffer, he and Sweeney would become personally liable therefor; that witness had consulted with Mr. Becker, President of the Columbia Title Company, Mr. Stetson, Vice-President of the Lawyers Title Company and Mr. Judson Cull, all of whom were well recognized and well known authorities on questions of law of this nature in this District and that it was their judgment as well as his own that the surplus held by him as aforesaid should be turned over to the makers of the note by reason of the express terms of the aforesaid deed of trust; that acting under such advice and judgment he turned over said surplus to the makers of said note because no action had been taken on behalf of the lien claimants to prevent him from so doing, and because the notices of liens were not judgments against the property and because if he did not turn over the surplus when the same was demanded, he and Sweeney would then

and there become liable to the makers of the said note in the amount of the aforesaid surplus.

Whereupon, to further maintain the issues upon their part joined, the defendants Sweeney and Roth called as a witness **Thomas Sweeney**, who testified substantially as follows:

That he was a defendant in the above entitled cause; that he was a police officer and acted solely upon the advice of the defendant Roth; that he joined with Roth in turning over the said surplus to Meyer and Stauffer for the reasons heretofore stated by Roth and for the further reason that Roth advised him so to do as an attorney and counsellor at law.

That then and thereupon it was admitted in evidence after due proof thereof a release of liens which provides among other things as follows:

46 *Release of Liens.*

This certifies that we, the undersigned, have this 16th day of April, 1927, relinquished to Meyer & Stauffer, Contractor-, under my contract with Adolph Meyer & B. W. Stauffer, all claims we may have at this date against premises No. [5204 &]* 5206, Lot [49 &]* 50, Square 1740, in the City of Washington, D. C., for materials furnished or labor performed in and about said premises, and waive our respective right to file any liens against the same after this date, and are satisfied to have payment made to said hereinbefore-mentioned contractor.

Material.	Labor.
* * * * *	* * * * *
Tilework.	D. Sabatini (Signed).
* * * * *	* * * * *
Eisinger Mill & Lumber Co.,	Eisinger Mill & Lumber Co.,
By W. G. Eisinger, Treas.	By W. G. Eisinger
(Signed).	(Signed).
Lumber, Mill Work, Glass.	
I Certify to above for payment.	
(Signed)	F. G. WILCOX,
	<i>Designer.</i>

[*Stricken in copy.]

Whereupon the Court called the attention of counsel for the plaintiff to the fact that the witness Eisinger, who had previously testified, was sitting at the trial table and the Court inquired of said counsel and of said Eisinger if either wished to explain the signing of said release of liens and said parties replied that they did not.

47 Whereupon both sides rested their evidence.

Whereupon counsel for defendants, Roth and Sweeney, moved the Court to dismiss the Bill upon the grounds heretofore stated before the taking of testimony and upon the further ground that the Bill was not a Bill to enforce a mechanic's lien because the prayers of said Bill did not conform to the prayer for relief as required by laws of the District of Columbia, the Bill did not conform to the requirements of said law, there could be no mechanic's lien upon personal property, mechanic's lien law in this District was purely statutory and, being in derogation of the common law, had to be strictly interpreted; and on the ground that the Bill and the evidence did not show a proper action for accounting because the specific sum due each mechanic's lien claimant was easily ascertainable, to wit, Eisinger Company, \$746.34; Atwood & Rupprecht, \$52.50; Sabatini, \$39.37; Nash, \$68.89; Schmidt, \$279.58; and on the further ground that the accounts were not complicated, that there was no mutuality between Roth and Sweeney and the lien claimants, that no discovery was sought, that there was no charge of fraud, that there was no fiduciary relation between Roth and Sweeney and the lien claimants, that the Bill and the evidence did not establish a trust in or on said Roth and Sweeney, that there was no express trust made by either the Bill or the evidence, that there was no trust by operation of law, for that there was no resulting trust, and there was no constructive trust in that neither the Bill nor the evidence charged nor showed actual fraud, and neither the Bill nor the evidence showed constructive fraud; that plaintiff had a plain, adequate and complete remedy at law; that the defendants, Roth and Sweeney, even if they were trustees, were guilty of an error of judgment only; that neither the Bill nor the evidence shows whether Adolph Meyer and B. W. Stauffer traded as individuals, a partnership, association, or corporation; that the contract between the plaintiff and Meyer and Stauffer was to furnish materials for both houses and

48 The contract was a unity and could not be divided into two contracts, hence the lien following the contract could not be a separate lien on each house and lot; that because the house on Lot 49 had been completed and the house on Lot 50 had not been completed, it was impossible to prorate plaintiffs' lien; that because the contract was an entirety the lien on Lot 49 and Lot 50 could not, by the action of the plaintiff, be transferred to or separated so as to apply to Lot 50; that neither the Bill nor the evidence showed what work or material was furnished for the respective houses on the respective lots; that the release of liens, set forth above, was a release of the entire claims of plaintiff and Sabatini; that the burden of paying the claims of plaintiff and Sabatini could not be shifted to one lot when both lots had been benefited; that plaintiff and Sabatini had exaggerated the amount of their liens upon Lot 50 and had not filed notices of liens claiming the "specific" sums as required by the Code of this District; that where one of two innocent parties must suffer the party causing the situation to exist must bear the loss; that equity aids the diligent; that the lien claimants slept on their right and were guilty of laches.

Whereupon the Court overruled the said motion to dismiss the Bill and signed the decree and finding of facts as appears in this Record, to all of which defendants Roth and Sweeney excepted.

Each and all of the exceptions so stated in the foregoing statement of evidence were duly noted by the Court at the time the same were severally taken at the trial of the above entitled cause and said exceptions are signed as the several exceptions taken at said trial this 29th day of June, 1933, nunc pro tunc.

PEYTON GORDON,
Justice.

49 Jerome Barnard, Esq.,
International Bldg.,
Albert Esher, Esq.,
Chandler Bldg.

GENTLEMEN :

Please take notice that on the 16 day of June, 1933, at ten o'clock A. M., the foregoing Statement of Evidence will be submitted to Mr. Justice Gordon for signature.

JAMES A. O'SHEA,
JOHN H. BURNETT,
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402 6th Street N. W.,
Attorneys for Def't Sweeney.
WALTER C. ENGLISH,
Woodward Building,
Attorney for Def't Roth.

Service of the foregoing Statement of Evidence acknowledged this 19th day of May, 1933.

PEELLE & LESH,
JEROME F. BARNARD,
Attorneys for Complainant,
Eisinger Mill & Lumber Company, Inc.

Endorsed on cover: District of Columbia Supreme Court. No. 6023. Joseph A. Roth et al., appellants, vs. Eisinger Mill and Lumber Co., Inc., &c., et al. Court of Appeals, District of Columbia. Filed Jul. 13, 1933. Henry W. Hodges, clerk.

(3741)

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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1933

No. 6023

JOSEPH A. ROTH AND THOMAS F. SWEENEY,
TRUSTEES, APPELLANTS,

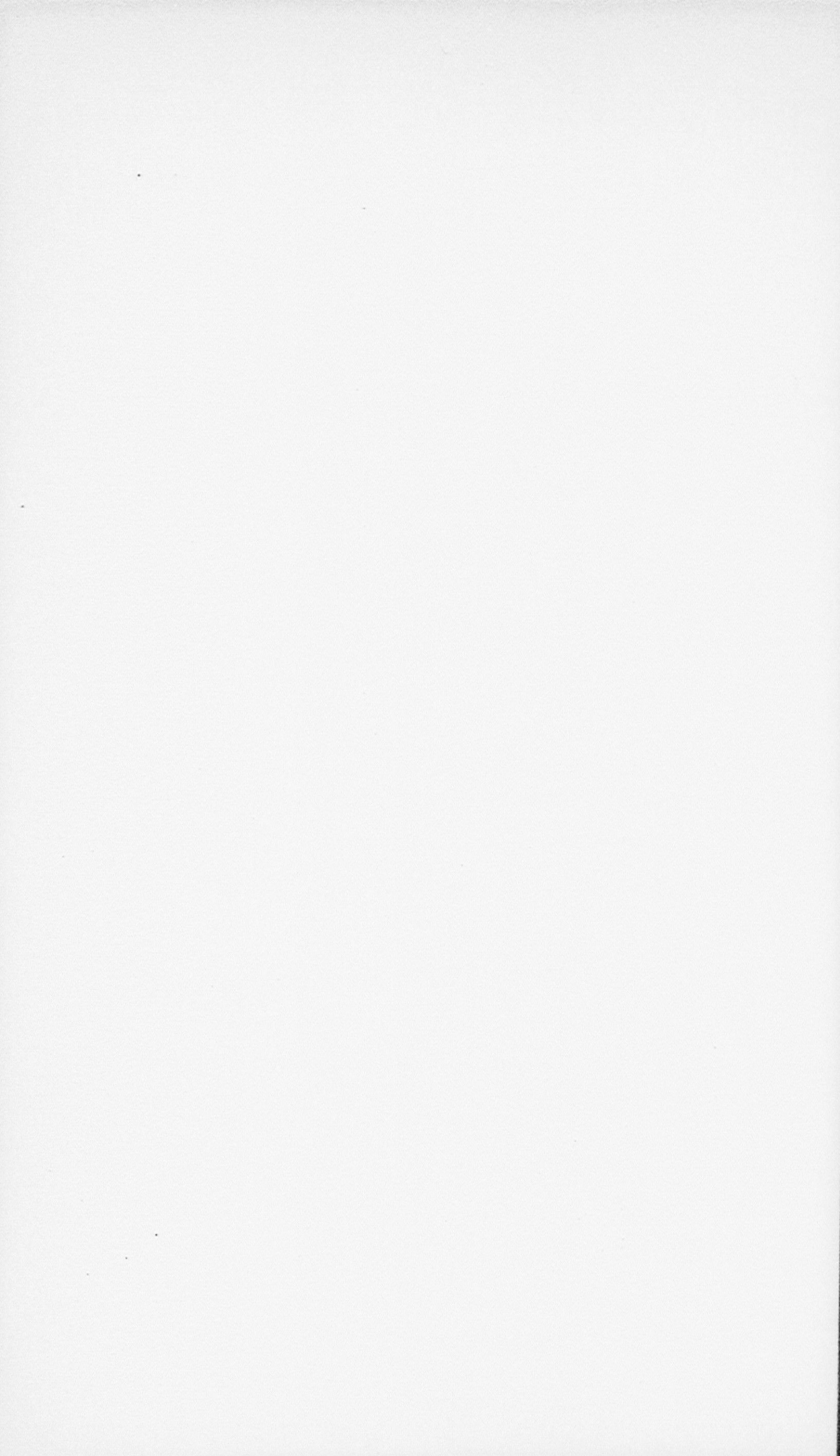
vs.

EISINGER MILL AND LUMBER COMPANY, INC.,
A CORPORATION, AND D. SABATINI, TRAD-
ING AS D. SABATINI AND COMPANY, AP-
PELLEES.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF OF APPELLANTS.

JAMES A. O'SHEA,
JOHN H. BURNETT,
ALFRED GOLDSTEIN,
Attorneys for Appellant Sweeney.



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In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1933

No. 6023

JOSEPH A. ROTH AND THOMAS F. SWEENEY,
TRUSTEES, APPELLANTS,

vs.

EISINGER MILL AND LUMBER COMPANY, INC.,
A CORPORATION, AND D. SABATINI, TRAD-
ING AS D. SABATINI AND COMPANY, AP-
PELLEES.

**APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.**

BRIEF OF APPELLANTS.

STATEMENT OF FACTS

Joseph A. Roth and Thomas F. Sweeney, appellants, together with five other parties, were defendants below. Eisinger Mill and Lumber Company, Inc., the first-named appellee, and Atwood & Rupprecht, a partnership, were plaintiffs.

Roth and Sweeney are the sole appellants and Eisinger Company and Sabatini & Co. are the only appellees.

The Bill of Complaint was "a bill for accounting in

the nature of a bill to enforce a mechanic's lien." (R. 31.)

Atwood & Rupprecht are not named as appellees, because, as to them, the bill was dismissed (R. 27), by stipulation of counsel. (R. 33.)

Decrees pro confesso were made final against four of appellants' co-defendants named in the bill. Those four were Adolph Meyer, B. W. Stauffer, C. William Schmidt and James T. Nash. (R. 27.)

The fifth co-defendant, Sabatini & Company, the second-named appellees, answered the bill, praying for the same relief as the bill (R. 19), and offered testimony at the trial. (R. 33.)

A final decree was entered against Roth and Sweeney in favor of Eisinger Co. and Sabatini. From this decree an appeal has been noted to this court. (R. 26-28.)

Eisinger Co., Atwood & Rupprecht, Sabatini, Nash, and Schmidt (the latter three being defendants) furnished labor and material for the erection of certain houses constructed by the defendants Meyer and Stauffer. These material men and laborers filed notices of mechanic's liens in the lower court. Thereafter, Roth and Sweeney, acting under a duly recorded deed of trust, sold the property upon which one of the buildings, built by Meyer and Stauffer, stood. There was a surplus, after paying the costs of the sale, due to Meyer and Stauffer, who had signed the notes secured by the deed of trust in order to get a builder's loan.

Relief was sought in the lower court because Roth and Sweeney paid the surplus from the sale under the deed of trust to Meyer and Stauffer rather than to the above-named parties who had filed notices of mechanic's lien, but who had not filed any bill to enforce the same.

Atwood & Rupprecht, prior to disbursement of the surplus did obtain a judgment for their claim (R. 31), but never levied execution upon it.

It was agreed in the lower court that the only ground upon which relief could be given to the plaintiff was because it had filed a notice of a mechanic's lien and that if the lien could not have been enforced, as any other mechanic's lien could have been, then the bill should have been dismissed.

The appellants will hereinafter be called defendants.

The facts are quite involved and counsel feel that, with the indulgence of the court, they should be fully set forth.

The Bill of Complaint (R. 2-11) alleged that Meyer and Stauffer owned Lot 50 in Square 1740 in this City, known as No. 5204 41st Street Northwest; that Meyer and Stauffer conveyed the said property to defendants, as trustees, to secure the payment of a promissory note; that on March 15, 1927, Meyer and Stauffer began the construction of a house on this property and a second house adjacent and attached thereto on Lot 49, known as 5206 41st Street Northwest; that Meyer and Stauffer made one contract with the plaintiffs for materials to be furnished and labor to be performed in the erection of both buildings; that Meyer and Stauffer made a written contract and several oral contracts with Eisinger Company for materials and paid thereon various sums, leaving a balance due to Eisinger Company of \$1895.34; that Meyer and Stauffer contracted for labor to be performed by Sabatini on both houses in the sum of \$100.00; that before the completion of the building on lot 50 Meyer and Stauffer defaulted in the payment of their promissory note, secured by the aforesaid deed of trust and defendants,

the trustees, sold the same at public auction, after advertisement, etc., under the terms of said trust and received therefor the sum of \$1186.70 as surplus, after full payment of all expenses incidental to said sale; that Eisinger Company notified defendants, Roth and Sweeney, that a notice of mechanic's lien had been filed prior to said sale; that notwithstanding such notice the defendants turned over said surplus to Meyer and Stauffer, makers of said promissory note and deed of trust; that the liens of all of the material men and laborers followed and were transferred to the aforesaid surplus obtained from the sale of said Lot 50 and that the material men and laborers were entitled to said fund because it was impressed with the trust for their benefit. The bill prayed for a decree against Roth and Sweeney, as "Trustees" and that said "Trustees" be required to account for said surplus; that a decree be entered against "Defendant Trustees" for said funds and interest wrongfully paid out.

The defendants Roth and Sweeney, answered (R. 14-18) and denied that the plaintiffs were entitled to the surplus obtained from the sale of Lot 50; that after the sale Roth was asked by some unidentified person speaking on behalf of Eisinger Co., whether any money had been received by the trustees; that Roth had not received any money and so advised said person, Roth also told him that if any money was obtained the said trustees would be compelled to turn over to Meyer and Stauffer any surplus proceeds of said sale unless legal proceedings were instituted to prevent the same; that the same information was given to representatives of Atwood and Rupprecht; that the trustees acted with due regard of the terms and powers contained in the deed of trust under which they acted, that said deed

of trust required said trustees to turn the surplus of any sale over to Meyer and Stauffer; that the first notice of sale was published in the newspapers on October 24, 1927, and the surplus from said sale was turned over to Meyer and Stauffer on December 14, 1927; that none of the lien claimants took any step to enforce the claim. The answer further denies that the claim of either of the plaintiffs or any of the defendants was protected by any of the notices of lien and it denies the averments in the Bill that the filing of notices of liens gave to such persons any right which followed the surplus. The answer alleges that the provisions of the deed of trust were paramount to any right acquired by any person who filed such notice of liens and it denies that the surplus fund was wrongfully paid over to Meyer and Stauffer but that it was paid to Meyer and Stauffer with due regard to and in proper performance of defendants duty as trustees. The answer further states that the plaintiffs had a plain, adequate and complete remedy at law.

After filing this answer, the defendant, Sweeney, (R. 20-21) filed a motion to transfer the cause from equity to law on the ground that the Bill of Complaint stated a cause of action which should be heard by a law court, and that the Bill showed on its face that plaintiffs had a plain, adequate and complete remedy at law. This motion was overruled (R. 21) and the Court proceeded to take testimony in this case.

Thereupon the defendants moved the Court to require the plaintiffs to elect upon what ground they sought relief, whether by way of account, or by bill for enforcing a mechanics' lien. Plaintiffs elected to stand upon the bill as a bill for accounting in the nature of a bill to enforce a mechanics' lien. The defendants

then moved the Court to dismiss the Bill on the ground that plaintiffs were not entitled to relief upon such ground and upon the Bill. This motion the Court overruled and defendants excepted thereto on the ground that the action stated in said Bill was not an action for accounting cognizable by this Court and was not a Bill to enforce a mechanics' lien as required by the law of the District of Columbia; and on the further ground that Meyer and Stauffer were not sued as individuals, partners, or as an association or a corporation. (R. 31.)

The testimony disclosed that Eisinger Company was owed \$1895.34 as a balance due for materials furnished in the building of two houses on Lots 49 and 50 in Square 1740, known respectively as 5206, 5204 41st Street Northwest; that Eisinger Company and Meyer and Stauffer, the latter two being the owners of said lots, entered into a written contract for the purchase and sale of certain materials for the erection of these two houses and that thereafter additional material was furnished. Payments were made under the written and oral contracts from time to time, but Meyer and Stauffer still owed the aforesaid balance to Eisinger Company. (R. 32.)

The particular material furnished to either house was unknown, because Eisinger Company furnished all of the material for and on account of both houses. (R. 32.)

The plaintiff, Eisinger Company, filed two identical notices of liens, one upon each of the aforesaid lots. They were the same in every respect. (R. 32.)

Roger W. Eisinger, secretary of Eisinger Company testified that he was present when Lot 50 was sold under the terms of the trust and that he bid it up to within \$100.00 of the sale price. On December 12,

Eisinger asked Roth if there was any surplus from the sale and that Roth replied that he did not have the money; witness then asked Roth what he intended to do when he did get the money and Roth stated that he intended to give it to Meyer and Stauffer; that Roth said that Eisinger Company would have to take some action to protect its rights either in a court of law or equity. In reply, the witness stated that he would not do anything but insisted that Roth and Sweeney turn the surplus money over to plaintiff because of a notice of lien that had been filed. (R. 32-33.)

This witness also talked to Sweeney on December 13 and asked what Sweeney was going to do and Sweeney replied that he would leave that up to Roth.

Plaintiff also offered testimony to the effect that another witness, an attorney, had obtained a judgment against the defendant, Meyer, for Atwood and Rupprecht. The witness testified that he told the defendant, Roth, that he had filed a notice of lien on behalf of Atwood and Rupprecht and asked for settlement of the same out of the surplus obtained from the aforesaid sale. This conversation occurred in October 1927. Roth stated to this witness that the witness would have to make application to a court of law or equity, otherwise Roth would be compelled to turn the surplus, when obtained, over to Meyer and Stauffer under the terms of the deed of trust. (R. 31.)

Defendants had \$1,186.70 with which to pay claims in the sum of \$3,013.69. (R. 7-9.)

Plaintiffs rested their case and the defendant, Sabatini, testified that he performed work and furnished material for the aforesaid two houses belonging to Meyer and Stauffer. He did not know what work he did on either

house. He filed a notice of mechanics' lien for this claim on both premises, each notice being in the same amount. The amount still due and owing was in the sum of \$100.00. Sabatini signed the release of liens which was later admitted in evidence. Sabatini rested his case and the testimony of Roth and Sweeney developed that Roth was an attorney and a member of the bar. Roth had been employed by Title Companies in this District for 18 years and had had experience in matters of this kind for that time. The deed of trust under which Roth and Sweeney acted was admitted in evidence and it provided among other things that upon the sale of the property because of default, any surplus remaining should be turned over to the makers of the promissory note to secure which the trust was given. (R. 35.)

The defendants received \$1186.70 as surplus from the foreclosure under said trust and they turned the same over to Meyer and Stauffer on the morning of December 14, before Roth was served with a copy of a notice of mechanic's lien filed by Eisinger Company. Roth admitted that he had been asked by plaintiff's witnesses to turn over any surplus he might obtain from said sale, but such request was made before such surplus came into his hands. However, at the time the requests were made Roth refused to turn over any sum to either of the plaintiffs and stated to plaintiff's witnesses that they would have to compel him to do so by process either in law or equity, because the terms of the trust under which he and Sweeney were acting required him to turn over the surplus to Meyer and Stauffer, otherwise he and Sweeney would become personally liable to Meyer and Stauffer. (R. 35.)

Prior to the advise given to plaintiff's witnesses,

Roth had consulted with Mr. Becker, President of the Columbia Title Company, Mr. Stetson, Vice-President of the Lawyers Title Company, and Mr. Judson Cull, all of whom were well-recognized and well-known authorities on questions of law of this nature in this District. That it was the judgment of these men, as well as his own, that any surplus that might come into his hands or the hands of his co-trustee should be turned over to the makers of the promissory note because of the express terms of the deed of trust. Roth acted under such advice and such judgment when he turned over the surplus to Meyer and Stauffer because no action had been taken on behalf of the lien claimants to prevent him from so doing, because the notices of liens were not judgments against the property and because he and Sweeney would have become liable to the makers of the note if they refused to release said surplus to the makers of the note. (R. 35.)

The defendant, Thomas F. Sweeney, was a police officer and acted solely upon the advice of the defendant Roth. He joined with Roth in turning over the surplus to Meyer and Stauffer for the reasons stated by Roth, and for the further reason that Roth advised him so to do as an attorney and counsellor-at-law. (R. 36.)

There was admitted in evidence a release of liens (R. 36) which Eisinger Company and Sabatini signed. This instrument was executed April 16, 1927, and relinquished to Meyer and Stauffer all claims for materials furnished or labor performed on premises 5206, the same being Lot 50, Square 1740, in this City. It waived the right to file any liens against the same. (R. 36.)

The Court called the attention of counsel for Eisinger Company to the fact that the witness, Eisinger, who had

testified on behalf of plaintiff company, was sitting at the trial table and the Court inquired of said counsel and of Eisinger if either wished to explain the signing of this release of liens. Each of the parties replied that they did not. (R. 37.)

Both sides rested the case and the defendants Roth and Sweeney, moved the Court to dismiss the Bill upon the ground stated before the taking of testimony and upon the following grounds:

1. The Bill was not a bill to enforce a mechanic's lien because the prayers of said Bill did not conform to the prayer for relief as required by the laws of the District of Columbia.

2. The Bill did not conform to the requirements of said law.

3. There could be no mechanic's lien upon personal property.

4. The mechanic's lien law in this District was statutory and, being in derogation of the common law, had to be strictly interpreted.

5. The Bill and the evidence did not show a proper action for accounting because the specific sum due each lien claimant was easily ascertainable, and the accounts were not complicated, there was no mutuality between Roth, Sweeney and the lien claimants, there was no discovery sought, there was no charge of fraud, there was no fiduciary relation between Roth, Sweeney and the lien claimants, the evidence did not establish a trust in or on Roth and Sweeney, there was no express trust made out either by the Bill or by the evidence, there was no trust by operation of law because there was no resulting trust and there was no constructive trust in that neither the Bill nor the evidence charged nor showed actual fraud.

6. Plaintiff had a plain, adequate and complete remedy at law.

7. Roth and Sweeney, even if they were trustees were guilty of an error of judgment only.

8. Neither the Bill nor the evidence showed whether Meyer and Stauffer traded as individuals, a partnership, association or corporation.

9. The contract between plaintiff and Meyer and Stauffer was to furnish materials for both houses and such contract was a unity and could not be divided into two contracts, hence the lien was not a separate lien on each house and lot.

10. It was impossible to prorate plaintiff's lien on each lot.

11. Because the contract was an entirety, the lien on both lots could not, by action of the plaintiff, be transferred to or separated so as to apply to Lot 50.

12. Neither the Bill nor the evidence showed what work or material was furnished for the respective houses on the respective lots.

13. The release of liens which Eisinger Company and Sabatini signed was a release of the entire claims of both.

14. The burden of paying the claims of Eisinger and Sabatini could not be shifted upon one lot when both lots had been benefited.

15. Eisinger and Sabatini had exaggerated the amount of their liens on Lots 50 and had not filed notices of liens claiming the "specific" sums as required by the Code.

16. That where one of two innocent parties must suffer, the party causing the situation to exist should bear the loss.

17. That equity aids the diligent.

18. That the lien claimants slept on their rights and were guilty of laches. (R. 37-38.)

The Court overruled this motion, to which defendants excepted, and signed the decree and findings of fact and of law as appears in the Record pp. 22-26, and the decree at pp. 26-28 of the Record.

ASSIGNMENTS OF ERROR

The Court erred:

1. In denying Defendant Sweeney's motion to transfer this action to the Circuit term of court.

2. In refusing to dismiss plaintiff's bill on motion made by defendants Roth and Sweeney when plaintiff elected to stand upon the bill of complaint as a bill for accounting in the nature of a bill to enforce a mechanic's lien.

3. In refusing to dismiss the bill of complaint at the close of all of the testimony.

4. In signing the findings of fact and findings of law.

5. In signing the final decree.

ARGUMENT

The Bill and The Proof Do Not Support the Decree

The defendants Roth and Sweeney were named in the caption of the Bill as individuals. In the Bill itself (R. 2, par. 2) they were sued "as the trustees under a certain deed of trust of record, hereinafter referred to, and further as the proper recipients of the net proceeds arising from the sale of said property, according to the terms of the said deed of trust."

The prayer for relief (R. 10, par. 2) asks a decree

“against the said Trustees, and that said Trustees be required to account” for the proceeds of the sale “received by the aforesaid Trustees.”

The decree (R. 27, par. 3) enters a judgment against Roth and Sweeney, personally and not as “Trustees.”

The Bill and the prayer for relief are against Roth and Sweeney “as Trustees,” yet the decree is against Roth and Sweeney, personally. There is no justification for the decree. The decree should have conformed to the Bill and judgment should have been entered, if at all, against Roth and Sweeney “as Trustees.”

This rule was specifically stated in *McIlhenny's Sons vs. New Iberia etc.*, 30 App. D. C. 337, 339, where the court, quoting from *Harrison vs. Nixon*, 9 Pet. 503, said:

. . . The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations the courts cannot judicially act upon them, as a ground for its decision, for the pleadings do not put them in contestation.

The rule is clearly stated in *Johnson vs. Voudrie*, 233 Ill. App. 572, 574:

A complainant must recover on the case made by his bill. He is not permitted to state one case in the bill and make out a different one in the proofs. The allegations and the proof must correspond. (citing cases.)

The law further is that a “decree cannot give relief that facts disclosed by the evidence would warrant where there are no averments in the bill to which the evidence can apply, and that if the evidence disproves the case made by the bill the complainant cannot be given a decree upon other grounds disclosed by the proofs, unless the court permits the complainant to

amend his bill so as to present the case disclosed by the evidence." *Lang vs. Metzger*, 206 Ill. 475-488. To the same effect is *Schmitt vs. Weber*, 239 Ill. 377-388.

The Nature of The Bill

Accounting. Mechanic's Lien

Plaintiff stated that its bill was "a Bill for accounting in the nature of a bill to enforce a mechanic's lien." Defendants then moved for its dismissal. (R. 31.) The Bill is not one for accounting. It does not partake of the nature of a bill to enforce a mechanic's lien.

The Bill does not disclose any ground for an accounting from defendants, either as trustees or personally. When the Bill was filed, plaintiffs alleged that the trust of defendants had been terminated.

Moreover, the Bill and the evidence showed that the specific sum due each lien claimant was easily ascertainable. Each claimant was entitled to his proportionate share of the surplus in the ratio of the amount of his claim to the total amount of all claims, for example, Eisinger's claim was $\frac{\$1895.34}{\$3013.69} \times \$1186.70 = \$746.34$. Each claim could be as easily ascertained. It follows that the accounts were not complicated. Relief is not obtainable on that ground. 1 R. C. L. 223 and cases cited, n. 2.

There were no mutual accounts between the lien claimants and defendants, that is neither of the two parties had received and paid on account of the other. A mutual account means "not merely where one of two parties has received money and paid it on account of the other, but where each of the two parties has received and paid on the other's account." *Phillips vs. Phillips*, 9 Hare 471, 473, 68 Eng. Rep. 596. (This is a leading case on this point.)

No discovery was sought by plaintiffs, there was no charge of fraud by the plaintiffs against the defendants. it follows that a bill for an accounting will not lie against these defendants. In *Coffman vs. Sangston*, 21 Gratt. 263, 269, the court said:

. . . The jurisdiction of courts of equity in matters of account involving the transactions and dealings of trustees and agents, is now well established. Not that the bare relation of principal and agent justifies the interference of the court in every case; but wherever it appears that a discovery is necessary, or there are mutual accounts between the parties, or the remedy at law is not plain, simple and free from difficulty, the equitable jurisdiction attaches.

There were no fiduciary relations between the lien claimants and the defendants sufficient to support a bill for accounting. Where a fiduciary relation exists, a *duty* to render an account must rest upon the defendant in whom special confidence was reposed, before he can be made to account. *Anderson vs. Watson*, 141 Md. 217, 234; see cases cited 4 Pomeroy's Eq. Jurispr., (2 ed.) p. 3370, n. 3.

The Bill and the evidence did not establish an express trust in favor of plaintiffs and against the defendants. This is true because there was no trust by operation of law and, most certainly, there was no resulting trust. There was no implied trust because there was no constructive trust; the Bill and the evidence alleged and showed neither actual nor constructive fraud. This is too plain to need authority to support it.

The Bill could not be filed to prevent a multiplicity of suits, because the latter term does not mean "multitude." Moreover, in order to file such a bill on that ground, there must be a community of interest in the

various adversaries. 10 R. C. L. 284, sec. 28; Nashville etc. R. Co. *vs.* Jenkins, 155 Tenn. 605, 296 S. W. 1, 53 A. L. R. 812.

If the plaintiff had any remedy at all, it had a plain, adequate and complete remedy at law. *Church vs. Holmes*, 60 App. D. C. 27.

Relief by way of accounting should have been denied. There are no grounds for accounting other than those set forth above.

Plaintiff admitted in the lower court that—If *Eisinger Co.* and *Sabatini* could not have enforced a mechanic's lien neither was entitled to relief.

Plaintiff was not entitled to relief even if the Bill was a bill in the nature of a bill to enforce a mechanic's lien. If the Bill were of such a nature, it would of necessity partake of the nature of the statute covering the enforcement of mechanic's liens. The right obtained to enforce mechanic's liens is purely statutory and in derogation of the common law. It must be strictly construed.

Lambie Co. vs. Bigelow, 34 App. D. C. 49, 55;
Heitz vs. Sayers, 1 W. W. Harr (Del.) 221,
 113 Atl. 901;
Cronin vs. Tatge, 281 Ill. 336, 118 N. E. 35;
Armstrong vs. Obucino, 300 Ill. 140, 133 N.
 E. 58;
Internat'l etc. Co. vs. Kensington etc. Co., 215
 Mich. 178, 183 N. W. 793.

There can be no mechanic's lien on personalty. *Haeussler vs. Mo. Glass Co.*, 52 Mo. 452.

The statutes (Tit. 25, Sec. 360, D. C. Code) requires that a bill to enforce a mechanic's lien “. . . shall pray that the premises be sold and the proceeds of sale applied to the satisfaction of the lien.”

The Bill herein does not ask such relief. Such relief

could not have been asked in this Bill because the bill discloses that the property was sold before the Bill was filed. There is nothing in the Bill that is in the nature of enforcement of a mechanic's lien.

The statute would not permit it and the plaintiffs could not allege it.

Relief under the mechanic's lien law was, therefore, impossible.

Plaintiff's Case

One Contract—One Lien

Eisinger Co., is the only plaintiff. If its case falls, the entire case falls. Eisinger Co's., case depends solely on the validity of its notice of lien. These statements were conceded by the plaintiff.

Eisinger Company and Sabatini proved that they furnished certain materials and performed certain labor for Meyer and Stauffer, who carried on and transacted business in some unknown and mysterious capacity. The materials and labor were for two adjoining houses on two adjoining lots. The agreement for the materials and labor was for both houses. There was no agreement to furnish any particular amount of material or labor to each house. The contracts for the material and labor, either express or implied, was a unity.

The District Code does not provide the manner of filing notices of mechanics' liens where there are two or more adjoining buildings erected and owned by the same persons. In case of trial on a bill to enforce a lien, however, it does provide that, (Tit. 25, Sec. 364):

In case of labor done or materials furnished for the erection . . . of two or more buildings joined together and owned by the same . . . persons, it shall not be necessary to determine the amount of work done or materials furnished for each separate building, but only the aggregate

amount upon all the buildings so joined, and the decree may be for the sale of all the buildings and the land on which they are erected as one building, or they may be sold separately if it shall seem best to the court.

Congress here speaks of evidence that need not be introduced. There is no suggestion that the section applies to the filing of notices of liens.

Where a contractor, by express or implied contract, undertakes to furnish materials or perform labor on a row of adjoining houses, such contract is an entirety and cannot be divided so as to cover each individual building.

It is undisputed that the contract between Eisinger Company on the one hand and Meyer and Stauffer on the other was that materials should be furnished by the former to the latter for the purpose of building both houses, one upon Lot 49 and one upon Lot 50.

Consequently, that contract was a unity and an entirety and could not be split up by Eisinger Company in such fashion so as to become two contracts, one for materials furnished for Lot 50, and one for materials furnished Lot 49.

Adjoining buildings erected on adjacent lots belonging to the same owner are deemed one building for the purpose of a mechanic's lien, if they are erected as one structure, under one contract, at the same time.

In *Phillips vs. Gilbert*, 101 U. S. 721, the mechanic pursuant to his contract with the owner of certain lots, erected a row of buildings thereon. The mechanic filed one lien on the entire row of lots and buildings. The owner sought to defeat the mechanic's right so to do on the ground that the mechanic should have filed a lien on each lot. The Supreme Court held that, that was not the law, but that the contract was an entirety

and liens could not be filed against the individual lots. The court said, p. 725:

. . . The contract was one, and related to the row as an entirety, and not to the particular buildings separately. The whole row was a building, within the meaning of the law, from having been united by the parties in one contract, as one general piece of work.

Consequently, the contracts of Eisinger Company and Sabatini were an entirety. Each contract "related to the row as an entirety, and not the particular buildings separately."

In such event, Eisinger Company and Sabatini could not divide their contracts and make them apply to the "particular buildings separately."

Mr. Justice Holmes in *Orr vs. Fuller*, 172 Mass. 597, (52 N. E. 1091) held that where certain houses in a group had been finished and others unfinished, the mechanic could not divide her claim for the unfinished houses, p. 600:

The facts that the work was done and the materials were furnished under one contract with the owner of the whole tract, coupled with the absence of any visible divisions, warranted a finding, if not a ruling, that the whole tract was one lot and that there was a lien upon the whole of it for the whole sum due, under Pub. Sts. c. 191, sec. 1 (citing cases).

In *Bastrup vs. Prendergast*, 179 Ill. 553 (53 N. E. 995), the lien was not to be defeated because *one* lien had been filed on two different, but adjoining houses. The court held that the lien was valid because the work was performed by the mechanic on the two buildings

“under the same contract.” At p. 562 of the opinion the court said:

. . . the structure must be regarded as one building, and not two separate and distinct buildings.

In the case at bar, the lien claimant divided and split their cause of action and regarded the structure as “two separate and distinct buildings.” Such an act is contrary to law.

The action should have been dismissed on the grounds urged by the defendants, namely, that:

. . . the contract between the plaintiff and Meyer and Stauffer was to furnish materials for both houses and such a contract was a unity and could not be divided into two contracts, hence the lien following the contract could not be a separate lien on each house and lot; (R. 37-38)

that because the house on lot 49 had been completed and the house on lot 50 had not been completed, it was impossible to prorate plaintiffs’ lien; (R. 38)

that because the contract was an entirety the lien on lot 49 and lot 50 could not, by action of the plaintiffs, be transferred to, or separated so as to apply to, lot 50; (R. 38)

that neither the Bill nor the evidence showed what work or material was furnished for the respective houses on the respective lots; (R. 38)

that the release of liens, set forth above, was a release of the entire claims of plaintiffs and Sabatini; (R. 38)

that the burden of paying the claims of plaintiff and Sabatini could not be shifted to one lot when both lots had benefited; (R. 38).

In Pennsylvania, the statute provided that where labor or materials were furnished on adjoining buildings,

the mechanic could file his lien on individual buildings if he prorated his claim according to the labor or materials furnished on each building. The courts there held that even where the statute gave the right to split the claim for lien, that could not be done where the contract was a unity.

The Pennsylvania statute, (Act March 30, 1831, sec. 4) provided:

. . . it shall be lawful . . . for the person so . . . providing materials . . . for two or more adjoining houses, . . . built by the same person, owner of the same and debtor for the said materials, to file with his claim thereof, an apportionment of the amount of the same, among the said houses . . . ; and each of the said houses and other buildings shall be subject to the payment of its said apportioned share of the debt contracted . . .

In the case of *Brick Co. vs. Johnson & Co.*, 3 Pa. Super. Ct. 220, the case was twice tried. After the first trial the Supreme Court sent it back for re-trial in order to determine, as a fact, whether the buildings on which two separate liens were claimed were adjoining or were separated by a street. At the second trial the lower court directed a verdict for the defendant on the ground that the contract for the materials was an entire contract and that plaintiff could not separate his liens and file two claims, one on one group of buildings and a second on another group, because the evidence showed that the lots upon which the buildings were erected were adjoining and not separated by a street. The Court of Appeals held such action to be proper, p. 227:

The appellant, under an entire contract with Hood, the contractor, who had an entire contract with Norton, the owner, for the erection of sixty-

five buildings upon one piece of ground, filed two claims instead of one, and apportioned the amount due between the two blocks of houses where there was in fact but one, thus creating each block an integer followed by another apportionment among the respective buildings in each artificial block. Had this piece of land been divided by a public street, the appellant's contract would have doubtless conformed to the true situation and two liens might have been sustained, one against each block. But as the block was entire the statute does not authorize the filing of two claims.

In the case of *West vs. Dreher* (1920) 73 Ind. App. 133, (126 N. E. 688), the court points out that (p. 135):

. . . The mechanic's lien law of the District of Columbia is not materially different from the Indiana Statute.

In that case, the court held that a filing of one notice of lien on two houses erected on contiguous lots was sufficient where the contract was one and the buildings adjoining. The notice was attacked because it was not filed separately upon each lot. The court quotes from *Phillips vs. Gilbert*, *supra*, and concludes, p. 136:

“ . . . the two houses, within the mechanic's-lien law of this State, are one piece of work,
 . . . ”

It follows that the houses, in this case at bar are, within the meaning of the mechanic's-lien law, one piece of work and a notice of lien upon each was insufficient and invalid.

The lien is founded upon and follows the contract. The contract is an entirety, therefore, the lien is an entirety.

In speaking of this the Supreme Court of Virginia in *Sergeant vs. Denby*, 87 Va. 206 (12 S. E. 402) said, p. 208:

. . . Indeed, in such a case, the lien must be joint or not at all; for although a lien is a creature of the statute, it must have its foundation in a contract. Hence, it must correspond with the contract, as has been decided by other courts in analogous cases upon statutes similar to ours.

In *Stoltze vs. Hurd*, 20 N. D. 412 (128 N. W. 115), plaintiff made a contract to furnish material for the construction of a building on two adjoining lots. Plaintiff waived his lien as to one lot and the part of the building thereon. Plaintiff then sought to recover the balance of his lien on the remaining lot.

The Code of North Dakota provides, (Sec. 6238, Rev. Codes 1905):

If labor is done or materials furnished under a single contract for several buildings, . . . the person furnishing the same shall be entitled to a lien therefor as follows:

2. If such buildings . . . are upon separate . . . lots, upon all such buildings . . . or lots upon which the same are situated; but upon the foreclosure of such lien the court may in the cases provided for in this subdivision apportion the amount of the claim among the several . . . lots in proportion to the enhanced value of the same . . . if such apportionment is necessary to protect the rights of third persons.

The court held that plaintiff was not entitled to relief. After pointing out that the steps to perfect a lien must be followed strictly, the court said, p. 417:

There was but a single joint contract made by defendant Hurd with the owners of the lots for

the construction of a building upon both lots. The plaintiff sold the building material to defendant Hurd, under one contract for both buildings.

The contract entered into by the lienor is the basis of the lien, and if the contract under which the work is done and the material furnished is joint, "the lien must be joint, or not at all." *Sergeant vs. Denby*, 87 Va. 206, 12 S. E. 402.

The United States Supreme Court in *Phillips vs. Gilbert*, 101 U. S. 721, . . . held that, such contract being joint, the lien must be joint. The opinion by Mr. Justice Bradley contains: "The contract was one and related to the row as an entirety, and not to the particular buildings separately. The whole row was a building within the meaning of the law, from having been united by the parties in one contract, as one general piece of work." . . . p. 418: The lien must follow the contract, and no valid lien can be had against one particular lot or building. The plaintiff was entitled to a joint lien upon the building and both lots, but is not entitled to a separate lien upon one lot, and to portion of the building situated thereon. See Sec. 6238, Rev. Codes 1905. If further authority is necessary, the following cases are in point: *Phillips vs. Gilbert*, 101 U. S. 721; *Holland vs. Cunliff*, 96 Mo. App. 67, 69 S. W. 737; *Lehmer vs. Horton*, 67 Neb. 574, 93 N. W. 964, 2 A. & E. Ann. Cas. 683; *Seattle L. Co. vs. Sweeney*, 33 Wash. 691, 74 Pac. 1001; *Phillips vs. Salmon etc. Co.*, 9 Idaho 149, 72 Pac. 886; *Bowman L. Co. vs. Newton*, 72 Iowa 90, 33 N. W. 377; *Childs vs. Anderson*, 128 Mass. 108; *Premier Steel Co. vs. McElwaine-Richards Co.*, 144 Ind. 619, 43 N. E. 878; *Williamette Mills Co. vs. Shea*, 24 Or. 40, 32 Pac. 762; *Batchelder vs. Rand*, 117 Mass. 176; *Eisenbeis vs. Wakeman*, 3 Wash. 534, 28 Pac. 923.

The fact that the complaint alleges that at the

request of the defendant Hurd and said A. S. Blakey, and with the consent of the defendant J. A. Roell, and in consideration of the payments to him of the sum of \$3000.00 by the said A. S. Blakey, the plaintiff waived his lien upon the said lot 21 and the part of the said building thereon standing, does not help the plaintiff. No agreement or consent by Hurd, Blakey, or Roell is binding on the other defendant who the plaintiff alleges claim some interest in the property.

In *Miller vs. Shepard*, 50 Minn. 268 (52 N. W. 894) the court pointed out that the statute provided that where there was one contract for the erection of two buildings on two contiguous lots, a lien could be filed against both lots. However, if the lien claimant severed his claim, the court held that he could not have judgment against one lot unless the lien claimant proved what proportion of labor or material entered into the construction of the one building against which the lien was filed. The court held (p. 272) that to apportion the lien under the facts in that case "was mere guesswork" and, therefore, refused to enforce the lien.

The lower court erred in failing to follow that reasoning and law.

Effect of Releasing Lien on Lot 50

In the lower court counsel for Eisinger Company argued that the release of liens made by it (R. 36) was a release of liens on Lot 49. There is nothing in the Record to support such an argument. Eisinger Company was called upon by the Court to explain why "No. 5204" and "Lot 49" were stricken in said release of liens. No explanation was given. Eisinger Co. and its counsel stated that they did not wish to explain. (R. 37.)

If the release of liens applied to Lot 50, and it did

so apply, then there is no case here. The Bill should have been dismissed.

Conceding, however, for the sake of argument, that the release of liens applied to Lot 49 and not to Lot 50, even then the court erred in granting relief.

In *Wilson vs. Wilson*, 51 Md. 159, the complainant, under one original and continuing contract, furnished materials for four houses, Nos. 595, 597, 599, 601 Lexington Street. House No. 601 was sold by the builder and was released by the complainant "from all claims of liens for materials heretofore furnished, and also for any to be furnished to the final completion."

Speaking of this release the Court said, p. 160:

This clearly excepts that house from the operation of this lien, and has also the effect of releasing the other buildings from any charge or liability in consequence of material being furnished for it, either before or after the release.

It will be noted that in Maryland, the statute does not require the lots to be adjoining.

In *Nickel vs. Blanch*, 67 Md. 456, (10 Atl. 234), certain material men contracted to furnish brick to be used in erecting dwelling houses in Baltimore. Some of the houses were on Broadway, others on St. Joseph Street. The material men released the lien claim against the houses on St. Joseph Street. The court held that they could not enforce the lien claim against the houses on Broadway. The court quoted from and followed *Wilson vs. Wilson*, *supra*.

In the release of liens here, the lien claimants waived any right to file a lien and stated that they were satisfied to have Meyer and Stauffer paid any sum due. Such sum was paid and certified to by the designer of the house (R. 36).

In such event, Eisinger Company and Sabatini have no standing in court. The facts in *Golrick vs. Tella*, 22 R. I. 281, 282, 47 Atl. 598 are analogous. There the court held that the lien claimants had no remedy.

In *Brown vs. Williams et al.*, 120 Pa. 24, (13 Atl. 519), Williams et al., contracted with Brown, the owner of certain property, to lay the brick on nine houses, four on one street, five on another. Brown wanted to sell the houses. The mechanics signed two releases of lien, one on each of the two groups of houses. The work on one group was finished while on the other it was unfinished. The releases among other things provided that all liens which the signers thereof (more than 20 in number) had executed, released "all manner of liens, claims or demands" we now "have or might or could have" against the owners and the premises. A dispute arose between the parties, whereupon Williams et al., filed mechanics liens. The court held that the releases were as to all work done and to be done, saying, p. 28 of the opinion:

. . . The terms employed are apt, and sufficiently comprehensive to do what they were very clearly intended to do, viz., to free the buildings from all "lien, claim or demand" for the materials furnished and work done on them. The date of such a release does not limit or restrict its operation. . . . It affects all the work done or materials furnished by him who signs it not a part of them; and it is an unconditioned agreement to look to the personal responsibility of the owner in lieu of the structure. The release was therefore relevant, and was an answer to the writ of scire facias which left the plaintiffs no standing whatever.

The sufficiency of the execution of the release by the plaintiff corporation cannot be questioned.

Yawkey-Crowley L. Co. *vs.* Acker, 194 Wis. 504, 217 N. W. 313.

In *Stockwell vs. Holt*, 48 Idaho 176, 178, (279 Pac. 629), the mechanic signed a release of liens but when testifying claimed that some matter in the copy admitted in evidence was not in it when he signed it. The court held the release valid and pointed out that the terms of the release were plain and unambiguous and if the mechanic's testimony were true "the moment such doctored instrument popped up in evidence, he should have nailed it as such necessitating a finding based on the evidence introduced instead of one erroneously predicated."

In our case, the plaintiff never did explain the striking out of "No. 5204" and "Lot 49" in the release. The court should have taken the failure to explain this most strongly against plaintiffs. The release was valid. The Bill should have been dismissed on that ground alone.

Effect of Exaggerating Lien

In this case, plaintiff and Sabatini filed two notices of lien, exactly the same, one against each lot.

Eisinger Company claimed a lien of \$1895.34 against Lot 49 and a lien of \$1895.34 against Lot 50, a total of \$3790.68, (R. 32) whereas its real claim was \$1895.34 against Lots 49 and 50 jointly. The building on Lot 49 had been completed. The building on Lot 50 had not been completed. Therefore, the lien on Lot 50, herein sued upon, was actually less than one-half of \$1895.34, namely was less than \$947.67. By the same token, Sabatini's claim on Lot 50 was less than \$50.00 rather than \$100.00.

In such event, a court of Equity should reject the entire claim.

In *Aeschliman vs. Presbyterian Hosp.*, 165 N. Y.

296 (59 N. E. 148), the court at p. 302 of the opinion said:

. . . The weight of authority in other courts of this state and in the courts of other commonwealths seems to be that where a claimant makes statements which are important and material, and they are wilfully and intentionally false, he cannot enforce his lien upon the property against which it is filed. . . .

(P. 304):

. . . There certainly can be no hardship in requiring a claimant to avoid intentionally and wilfully making an exaggerated claim which he knows not to exist. The requirement that he shall truthfully state his claim is in no way unjust to the claimant, but it is preeminently just to the owner, to other claimants or lienors, and to those who are engaged in administering the lien law.

The court also points out that this same rule is established law in New Jersey, Connecticut, Massachusetts, Michigan, Iowa and Missouri.

D. C. Code, Tit. 25, Sec. 352, provides that a mechanic shall file a notice of lien "specifically setting forth the amount claimed" etc.

In this case the plaintiff and Sabatini did not "specifically" set forth the amount due. They filed a notice of lien on each lot for the full sum due them on both houses, not the proportionate sum due them from each house. Each more than doubled the amount of their liens.

In *Edgar vs. Salisbury et al.*, 17 Mo. 271, the court refused to enforce a mechanic's lien because the claim was for a sum in excess of what was due. The court said, p. 272:

When a mechanic or other person claims to have a lien upon a building, he is to file a just

and true account of the demand due him, after all credits are given, and that account must appear to be for work or materials for which the statute gives a lien, and if, in a demand upon a single item of charge, any services for which he might have a lien, are combined with other charges for which no lien is given, the whole benefit of the act will be lost. In such a case, *it would be impossible for any person to separate the different portions of the demand, and ascertain how much of the gross charge was an incumbrance on the property, and how much was for general indebtedness. The object of these acts is to make certain classes of debts incumbrances on the property, binding the same when the statute is complied with, into whosoever hands it may come. The lien is but the creature of the statute, and only arises, and can only be enforced as the statute directs.* (Italics supplied.)

In the case at bar, the plaintiff's and Sabatini's notices of liens claimed the full sum due on both lots and not the specific sum due on Lot 50. Such notices of lien, therefore, did not make that debt an "incumbrance on the property . . . into whosoever hands it may come." The defendants were not bound thereby.

The object of this rule is stated in *Nelson vs. Withrow*, 14 Mo. App. 270, 277, as follows:

. . . The reason of this ruling is that the owner of the building has the right to know, from the account filed, the amount which, under the law, has become a charge upon the property, in order that, by paying or tendering this amount, he may discharge the property of the incumbrance.

If the rule were otherwise, a mechanic could stop the sale of land by enlarging a claim of \$5 to one of \$5,000 or any other mythical sum. The owner would then have to pay the same or pay the premium on a bond

in the latter sum for which he could never be reimbursed.

The statute was intended as a shield for the mechanic but not as a sword.

In the case at bar, there was no way for the defendants to determine what part of the "gross charge was an incumbrance on the property, and how much was for general indebtedness."

The defendants were not at liberty to decide whether the lien was an incumbrance on the property or whether some of it was for general indebtedness. That could only be determined by a court of competent jurisdiction. The plaintiff and Sabatini would certainly have objected to the defendants constituting themselves such a court.

Defendant's Case

Duties as Trustees

The contention of the plaintiff at the trial was that the defendants, Roth and Sweeney, should have held the surplus fund until the running of the statutory period of limitations for filing suit to enforce the lien, namely, for a period of one year. When this period of one year was to start or stop could not be ascertained, because the notices of liens were all filed on different dates. Each lienor had a different date for the running of the period of limitations. That contention cannot be maintained because of the fact that the defendants, Roth and Sweeney, were acting under the terms of an express trust, which was admitted in evidence, and which provided that any surplus money was to be turned over to the makers of the note. The deed of trust was an express trust and its terms bound the defendants, Roth and Sweeney, more firmly than any implied trust that could be imputed to them by the plaintiff.

This express trust required Roth and Sweeney 1st, to pay all expenses of sale and 2d, to pay the balance

due on the note, if any, and 3rd, "to pay the remainder of the proceeds, if any there be, to said parties of the first part" (R. 35.)

Acting under this trust, the defendants told the lien claimants the trustees would have to act according to the terms of their trust unless prevented therefrom by proper court action. Such action of the defendants was correct.

In 3 Pomeroy's Eq. Jurisp. (4 ed.) sec. 1062, the rule as to express trusts is as follows:

Under the general obligation of carrying the trust into execution, trustees and all fiduciary persons are bound, in the first place, to conform strictly to the directions of the trust. This is in fact the corner-stone upon which all other duties rest, the source from which all other duties take their origin. The trust itself, whatever it be, constitutes the charter of the trustees powers and duties; from it he derives the rule of his conduct; it prescribes the extent and limits of his authority; it furnishes the measure of his obligations. If the trust is express, created by deed or will, then the provisions of the instrument must be followed and obeyed A trustee can use the property only for the purposes contemplated in the trust, and must conform to the provisions of the trust in their true spirit, intent, and meaning, and not merely in their letter. If, therefore, through non-feasance, he omits to carry the trust into execution, or through misfeasance he disobeys the directions of the trust, he renders himself in some manner liable to the beneficiary whose rights have thus been violated.

The deed of trust required defendants to turn the surplus of the sale price over to the makers of the note. If they had held it for one year or had paid it out to the

lien claimants, they would have violated the terms of the trust and thus would have rendered themselves liable to the beneficiaries.

Once the express trust, created by the deed of trust, was completed, it could not be revoked. 1 Perry on Trusts (7th ed.) Sec. 104.

Refusal of Plaintiff to Protect Its Claim

When the defendants, Roth and Sweeney, took the position that the plaintiff would have to protect its rights by appropriate action in the courts, either by injunction, garnishment or attachment and called upon it so to do, (R. 33 top, R. 35) the defendants fulfilled their duty.

Undoubtedly, the plaintiff could have obtained relief in court, then and there. Carr vs. Brawley, 34 Okla. 500, 125 Pac. 1131, 43 L. R. A. (N. S.) 302 (by garnishment); Cummins vs. Christie, 179 Mass. 74, 60 N. E. 396, 88 A. S. R. 357 (attachment); 8 R. C. L. 11 (creditors bill, execution); notes: 97 Am. Dec. 308, 309 (execution); Ann. Cas. 1914 B 953 (creditor's bill).

It should not be permitted to come into court nearly one year later and obtain relief from the trustees personally.

Equity aids the diligent.

Surplus Insufficient to Pay All Claims

What claims should defendants have paid? Defendants had \$1186.70 with which to pay claims in the sum of \$3,013.69 (R. 7-9). Who was entitled to be paid?

The defendants holding the surplus funds could not disburse any money to any person who had filed a lien until it had been determined whether the lien was valid. Before the surplus could have been paid over to any lien claimant, several questions of law and fact had

to be determined in favor of such claimant. Were the notices of lien filed on time? Should the defendants have been compelled to determine as a matter of fact and law when the building was completed or when the contractor abandoned the contract? Should the defendants have been compelled to determine as a matter of fact and law whether any of the lien claimants were or were not subcontractors and if subcontractors, whether they had given proper notice under the Code? Whether, as a matter of fact and law there was a counter-claim or set-off to the liens and if so, what the amount was? Whether, as a matter of fact and law there had been any assignment, waiver, discharge, or release of any or all of the liens? Whether they should regard all notices of lien as valid and prorate the surplus?

All such questions had to be definitely and positively answered before any lien could have been paid off and lifted, otherwise, the defendants would have been personally liable for paying off a lien improperly claimed and filed.

Tit. 25, Sec. 363 of the Code provides that if one, or some only, of the contractors file notices of liens, such persons shall have priority over those not filing. Should the defendants have been compelled to learn of this fact and then sit as court and jury upon such question? The same section provides that the sum due the lien claimants shall be prorated after excluding payments made to the original contractor before the notices of liens were filed. Should the defendants have been compelled to determine as a matter of fact and law whether the contractor had been paid anything after any lien was filed and then say what sum was due each person?

Certainly not. In this case, there were 5 notices of

liens filed and **THE COURT DETERMINED THAT ONLY TWO LIEN CLAIMANTS WERE ENTITLED TO BE PAID.** The court could deny 3 claims but the defendants could not. If the defendants had arrived at such a conclusion, they would not have been relieved from the claims of the other three claimants; the defendants had no right to pass upon the validity of any claim. It is true that 3 lien claimants did not prove their claims, but when the defendants paid the money to the makers of the note, how could the defendants have known who was and who was not going to prove his claim. The three persons who failed to prove their claims were personally served, yet they failed to appear and answer, whereupon a decree pro confesso was taken against each (R. 27). Evidently, their claims were invalid or were improperly filed.

THE COURT DID NOT PRORATE THE SURPLUS FUND BETWEEN ALL FIVE LIEN CLAIMANTS BUT BETWEEN TWO OF THE FIVE. Could the defendants have known that that was the proper thing to do? Why, if the defendants had so prorated the surplus they would indeed, have become personally liable therefor.

It was not up to the defendants to settle these questions. The plaintiff refused to protect itself by failing and actually refusing to attach, or restrain the payment of, the surplus funds, yet such plaintiff now objects because the defendants sought to protect themselves. Such complaint has no equity in it.

To say that the defendants, Roth and Sweeney, should have taken some court action is to impose upon them a duty entirely foreign to the terms of their express, written trust.

Roth and Sweeney, having done everything that in good conscience they were bound to do, cannot be

penalized because the plaintiff slept upon its rights. Equity will not lend its aid to persons so failing and lacking in diligence.

Notice of Lien is Not a Judgment

Plaintiff relied upon the case of *Church vs. Holmes*, 60 App. D. C. 27. That case is entirely different from the case at bar. In the Church Case, the claim upon which suit was filed had been reduced to a judgment of record.

A judgment of record and a filing of a notice of lien are entirely different things. The former is a claim reduced to judgment, the latter is simply a step in the procedure to reduce a claim to judgment. A judgment is entitled to priority. A notice of lien is a notice that the claimant may file a suit to enforce his claim, if he wishes. It is an inchoate right only.

Tit. 25 Sec. 359 of the Code provides that:

The lien hereby given shall be preferred to all judgments, mortgages, deeds of trust, liens, and incumbrances which attach upon the building or ground affected by said lien SUBSEQUENTLY TO THE COMMENCEMENT OF THE WORK UPON THE BUILDING . . .

Such wording gives the lien claimants no priority over Meyer and Stauffer as to the surplus. The notice is not a judgment as yet. Priority exists only when a deed of trust is put on the property after work starts thereon. The deed of trust herein was made and recorded before work was commenced. Therefore, no priority existed as to it, if the statute is to be interpreted strictly as required by law.

That the notice of lien is not to be considered as a judgment is clearly set forth in the Code, Tit. 25, sec. 376. There, it is provided:

. . . the proceeding to enforce such lien shall be by bill or petition in equity . . . subjecting the thing upon which the lien was attached to sale for the satisfaction of the plaintiffs demand, *shall adjudge* that the plaintiff recover his demand against the defendant from whom such claim is due, and may have execution therefor as at law.

The lien does not have the force, standing or effect, of a judgment until a decree has been signed after suit to enforce the lien.

Until the suit to enforce the lien has been adjudicated, no one can say that the lien has any dignity other than a mere notice that a mechanic MAY file suit to enforce a claim upon a certain piece of property.

Mechanic's Lien In Rem, Not in Personam

The effect of filing a notice of lien is,—if anyone buys such property the lien, being against the res, follows the property. However, if the property is sold under deed of trust, filed before the work was commenced, as this one was, the liens do not remain upon the res.

If they do not remain upon the res, how can they follow or attach to the surplus? A lien is a creature of statute, the action thereon is in rem. When the res is no longer subject to, but free of, the claim, there is no way to enforce the claim because the jurisdiction of equity is based upon the statute and the law established thereunder by the courts.

The jurisdiction of equity, in cases of mechanic's liens, rests upon the statute and can extend no further. *Canal Co. vs. Gordon*, 6 Wall. 561, 571.

When, under the statute the lien is inoperative, the lien and claims of lien ceases. Equity cannot pursue it further even by way of "a bill for accounting in the nature of a bill to enforce a mechanic's lien."

The notice of lien filed by the plaintiff cannot be said to have required the defendants, Roth and Sweeney, to have regarded the same as judgments. The notice of lien filed by the plaintiff was in the nature of a claim and gave the plaintiff a right to file an action in rem. The filing of the notice of lien had not the dignity of a cause of action and unless a bill to enforce the same was filed any rights accruing because of the filing died within one year thereafter.

Good Faith and Judgment of Defendants

None of the cases cited to sustain the opinion in *Church vs. Holmes*, supra, affect the case at bar. Counsel went over those cases minutely in his argument in the lower court and at the request of the court, briefed each case, and at that time showed to the court their inapplicability to the present case.

The position of the defendants is that if the Church Case is applicable here then the plaintiff is out of court for the reason that he had a plain, complete and adequate remedy at law.

Moreover, the Church Case in quoting from *Markey et al., vs. Langley et al.*, 92 U. S. 142, 155, clearly relieves the defendants, Roth and Sweeney, from any liability. Sweeney took the position from the outset that Roth was the man to look to in the controversy between plaintiff and the trustees. Roth testified that he had been a title man for over 18 years, that he was trained and had had experience in questions of a nature similar to the one at bar; that he, Roth, had consulted Messrs. Becker, Cull and Stetson, all well-known authorities upon matters of the nature of this particular case; that it was Roth's best judgment and opinion as well as the opinion and best judgment of those whom he consulted that he, Roth, act as he did act in this case.

In such an event, Roth, acting for and on behalf of himself and his co-trustee, can only be said to have been guilty of an error of judgment, if anything.

At p. 30 of the opinion in the Church Case, quoting from the Supreme Court, the Court said:

“ ‘A mortgagee in such circumstances, is a trustee for the benefit of all concerned. He must regard the interest of others as well as his own, he should seek to promote the common welfare. If he does this and keeps within the scope of his authority, a court of equity will in no wise hold him responsible for mere errors of judgment, if they have occurred, or for results however unfortunate, which he could not reasonably have anticipated.’ ”

The Church Case was decided a little over three and one-half years after Roth and Sweeney made up their minds to act, and acted, as they did. Their judgment at that time was based upon the judgment of three men learned in real estate law. The motives of Sweeney and Roth were above suspicion.

The Court of Appeals at p. 30 of the opinion in the Church Case pointed out that that Court was not “able to find a case exactly analogous to the case at bar.”

It stands to reason, therefore, that Roth and Sweeney could not find an analogous case in 1927, and they acted at their best judgments dictated.

Consequently, it logically follows that Roth and Sweeney cannot be held “responsible for mere errors of judgment if they have occurred, or for results, however unfortunate, which they could not reasonably have anticipated.”

Conceding, for the sake of argument, that Roth and Sweeney were trustees, then they had to use only such

care and prudence as an ordinary man would exercise under like circumstances in connection with his own affairs. *Wylie vs. Bushnell*, 277 Ill. 484, 115 N. E. 618.

The standard for the good faith and sound discretion of Roth and Sweeney is the good faith and sound discretion as those terms are understood by reasonable men of good judgment. *Kimball vs. Whitney*, 233 Mass. 321, 122 N. E. 665.

If a trustee acts as others would act with their own property, and if he acts in good faith, then all that is required of such trustee is that he use and exercise common skill, common prudence and caution. In *re Detre's Estate*, 273 Pa. 341, 117 Atl. 54.

The defendants acted not alone in their judgment, but consulted the best authority upon this subject which they could find. No man could do more.

Mr. Eisinger, secretary of Eisinger Company, was at the sale of the premises conducted by Roth and Sweeney. He not only had constructive notice of the terms of such trust, he must have had actual notice, for he bid on the property. Eisinger knew that the deed of trust was paramount to any claim his company might have on the property. Yet he refused to take steps to protect his company.

We ask the court to invoke that rule of Equity which protects such persons as the two defendants, Roth and Sweeney, whose actions were above reproach and were not impugned. That rule is,—where one of two innocent persons must suffer the one who caused the parties to be placed in the situation that they find themselves is the one who must bear the loss. Had the plaintiff in this case acted upon his rights, if any he had, and if the plaintiff had not stubbornly and arbitrarily demanded that the defendant trustees accede to its

demands, then there would have been no trial in this case. The plaintiff had full opportunity to protect itself in the situation in which it was and having failed so to do, the defendants, Roth and Sweeney, should not be held liable and responsible for the inaction and the stubborn and arbitrary attitude of the plaintiff company.

If this reasoning is applied to Eisinger Company, then Sabatini's case fails also, because Eisinger Company is the only plaintiff in the case. If the plaintiff's case fails, there is nothing for the court to pass upon, because Sabatini filed no cross-bill and was not aligned as plaintiff.

CONCLUSION

The facts, the law and equity of this case require a reversal thereof, with directions to enter a decree for appellants.

JAMES A. O'SHEA,
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Attorneys for Appellant Sweeney.

OCT 3 1933

Thurman H. Dodge

IN THE

CLERK

Court of Appeals, District of Columbia

OCTOBER TERM, 1933.

No. 6023.

JOSEPH A. ROTH AND THOMAS F. SWEENEY, TRUSTEES,
Appellants,

vs.

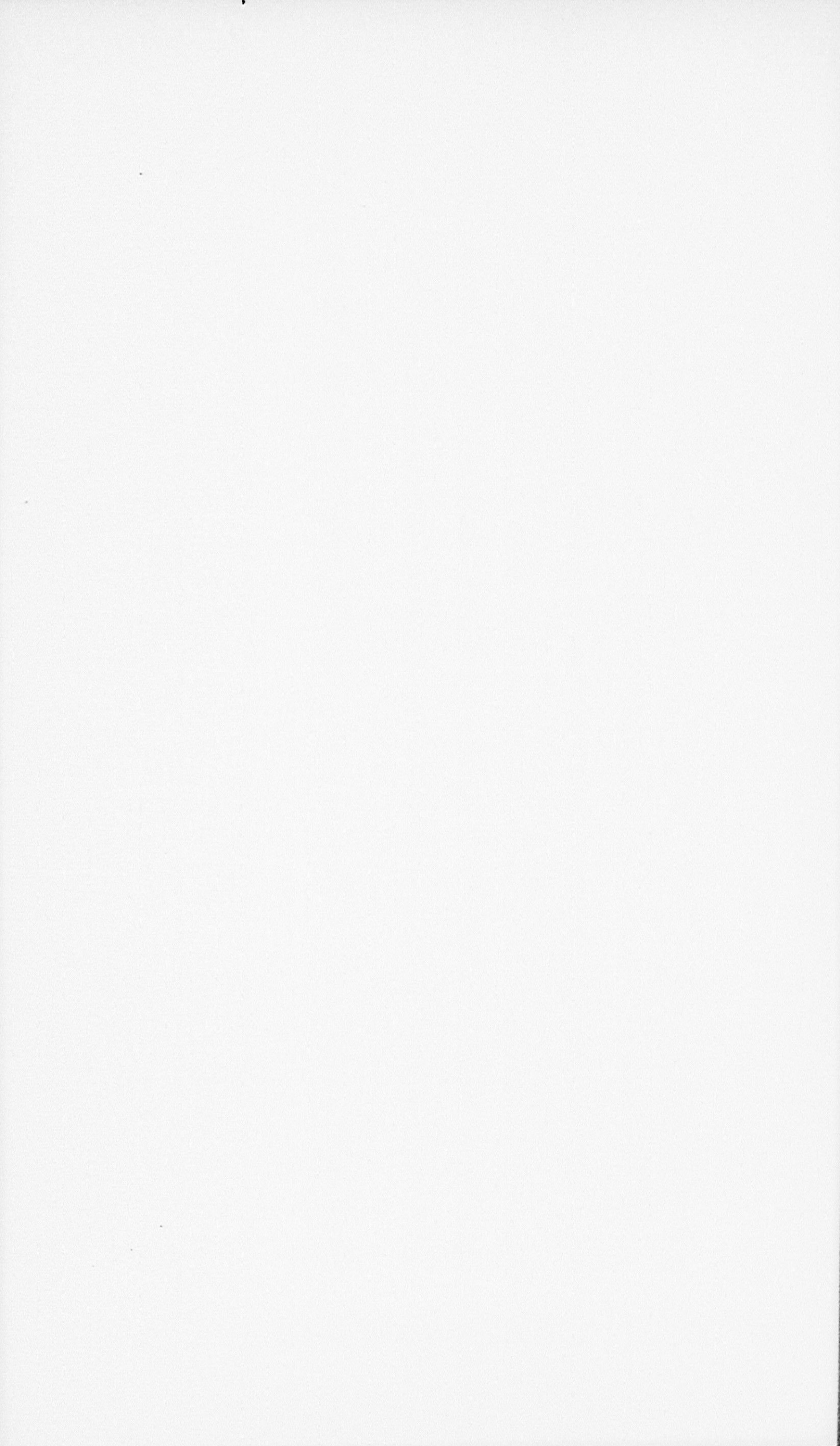
EISINGER MILL AND LUMBER COMPANY, INC., A CORPORATION,
AND D. SABATINI, TRADING AS D. SABATINI AND
COMPANY, *Appellees.*

BRIEF FOR APPELLEES.

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IN THE
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OCTOBER TERM, 1933.

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EISINGER MILL AND LUMBER COMPANY, INC., A CORPORATION,
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BRIEF FOR APPELLEES.

STATEMENT OF THE CASE AND EVIDENCE.

The Appellants' statement of facts should be supplemented in a few particulars, because the evidence relied upon by appellees upon the controverted issues is understated, and inaccurately stated in some particulars. The appellants have attempted a general review of the substance of the bill of complaint and answer,

and a general discussion of the record, in spite of the full findings of fact (R. 22-25), and the statement of evidence (R. 30-38).

Although counsel for appellee, Eisinger Mill and Lumber Company, Inc., were willing to describe the bill of complaint as "A Bill for Accounting in the Nature of a Bill to Enforce a Mechanic's Lien" (R. 31), and still feel that such a description is adequate, the record fails to show that the lower court required an election in this respect, and it is submitted that the bill of complaint speaks for itself and its character and the relief sought are clearly shown by the prayers contained therein (R. 10-11).

A final decree was entered against Roth and Sweeney in favor of Eisinger Company and Sabatini, and also against the defendants, Adolph Meyer and B. W. Stauffer, the former owners of record of the property involved.

Page 2 of the appellants' brief states that there was a surplus, after paying the costs of the sale of the property "due to Meyer and Stauffer, who had signed the notes secured by the deed of trust in order to get a builder's loan"; but the principal issue in this case is whether such surplus was due to Meyer and Stauffer, and the lower court has decided it was not due to them.

Appellants state that relief was sought in the lower court because Roth and Sweeney paid the surplus from the sale under the deed of trust, to Meyer and Stauffer rather than to the mechanic lienors of record, but it should be added that relief was also sought upon the ground that the plaintiffs had valid and subsisting liens upon the real estate and later upon the fund in the hands of the trustees, for which the trustees should account to the plaintiffs.

Appellants state it was agreed in the lower court that if the plaintiff's lien could not have been enforced as any other mechanic's lien could have been, then the bill should have been dismissed; but this statement is nowhere supported by the record in this case and is entirely unwarranted.

Since the appellants have seen fit to discuss, at some length, the answer, under oath, filed by them, it may here be pointed out that while in the answer (R. 16) they deny that plaintiff Eisinger notified them, or either of them, of plaintiff's alleged claim, and further deny that they had either actual or constructive notice of any claim, except as shown in the answer in a nebulous way, nevertheless the findings of fact (R. 25) and the statement of evidence (R. 35) both clearly show that both defendants had ample actual notice of the existence of the liens.

The findings of fact show that the defendants had \$1180.76 with which to pay claims (R. 25), rather than the figure of \$1186.70 stated on page seven of appellants' brief.

The defendants testified that they received the surplus fund from the foreclosure sale on the morning of December 14 (R. 35). Eisinger testified (R. 32-33) that Roth told him on December 12 that he did not have the money, and that he (Eisinger) talked with Sweeney on December 13, and asked Sweeney what he was going to do about the surplus, and Sweeney told him he would leave it up to Roth; so that defendants could not have held the money more than two days before turning it over to Meyer and Stauffer.

Appellants state on page 9 of their brief that the release of liens dated April 16, 1927, relinquished to Meyer and Stauffer all claims for materials furnished, or labor performed on premises 5206, the same being

Lot 50, Square 1740, in this City, and that it waived the right to file any liens against the same; but such release of liens contained obvious errors, in that it purported to cover premises No. 5206 as being on Lot 50, and eliminated, by lining out, Lot 49, in Square 1740, as being improved by premises No. 5204; whereas, Lot 50, in Square 1740, was actually improved by premises No. 5204, and Lot 49 was actually improved by premises No. 5206 (R. 22-25).

ARGUMENT.

The Bill and the Proof Support the Decree, and the Findings of Fact Support the Decree.

At the outset, it may be pointed out that the record does not give, or purport to give, the substance of all the testimony bearing upon the findings of fact. This Court has held that in order that an appellate tribunal may pass intelligently upon the ruling of a trial court, the record must give, and purport to give, the substance of all the testimony bearing upon such ruling (*Klopper v. District of Columbia*, 25 App. D. C. 41; 33 W. L. R. 153). And this court has also held that the record should contain, and purport to contain, the substance of all the testimony given in the case, when it is desired to have the ruling of the appellate court on the whole case. *McCaully v. United States*, 25 App. D. C., 404; 33 W. L. R. 306. It may also be pointed out that this Court has regarded itself as bound by the findings of fact made by the court below. In the case of *Shell Eastern Petroleum Products, Inc. v. James F. White and Grace Edith White*, 62 W. L. R. 4, this Court said:

“As a preliminary statement, we think it well to say we regard ourselves bound by the findings of

fact made by the court below. *Lawson v. Mining Co.*, 207 U. S. 1; *Butte & Superior Co. v. Clark-Montana Co.*, 249 U. S. 12, 30."

The appellants argue that the decree is against Roth and Sweeney personally, whereas they were sued as trustees, and that the decree does not conform to the bill, because any judgment should have been entered against Roth and Sweeney "as trustees". We think it apparent that such a captious point is untenable. It forms no part of the assignments of error, which are required to be filed in advance of the statement of evidence, it appears nowhere in the record, but for the first time in the appellants' brief. If it could properly be urged at this time it would be answered by saying that the appellants are sued as the trustees under the deed of trust and the proper recipients of the fund involved (R. 2), they both answered as trustees (R. 14), and the bill asks that they be required to account to the plaintiffs for the fund rightfully belonging to them, but wrongfully and improperly turned over by the trustees in violation of their duties as such. The entire record clearly shows the appellees' contention, and the theory of the case, that the defendant trustees were liable as such and became personally responsible for their unjustified act in turning over the fund in their hands to the former owners of the property sold, and the lower court has required them thus to account and make good the fund held by them as trustees out of their own pockets. The authorities support the proposition that trustees, sued as such, may be required to account for funds held by them and improperly applied, to the persons entitled thereto, and that in such case the trustees may be held individually responsible to such persons for the fund involved. *Clews v. Jamie-*

son, 182 U. S. 461, 478, 479, 480, 45 L. Ed. 1183, 1193. See also *Church v. Holmes*, 60 App. D. C., 27, 29, upon the question of individual responsibility of trustees.

Appellants rely for support in this respect upon the case of *McIlhenny's Sons v. New Iberia, etc.*, 30 App. D. C., 337, 339; but the case is not in point, because there it was held that the right of a petitioner to intervene in a proceeding in the Patent Office for cancellation of a registered trade-mark was dependent upon a showing of interest, and that the petition did not contain a showing of fact on this jurisdictional question. At page 339, the court quotes from the case of *Harrison v. Nixon*, 9 Pet. 503:

“ ‘Every bill must contain in itself sufficient matters of fact, *per se*, to maintain the case of the plaintiff; so that the same may be put in issue by the answer and established by the proofs.’ ”

In that case the bill contained no averment of the actual domicile of the testator at the time of making his will, and this was considered a vital defect. It cannot seriously be questioned that the pleadings in our case were not properly put in issue by the bill and answer.

The case of *Johnson v. Voudrie*, 233 Ill. App. 572, 574, cited by the appellants, is likewise inapplicable. There the bill charged that a man and his wife had executed a note and mortgage, but the court found them to be forgeries, and thereupon the proponent of the bill on appeal contended that even though they were forgeries they had been acknowledged and benefits received thereunder.

It is submitted that there are ample averments in our bill to which the evidence can apply and that the decree is based upon the grounds disclosed by the proofs.

The cases of *Lang v. Metzger*, 206 Ill. 475, and *Schmitt v. Weber*, 239 Ill. 377, 388, are likewise not in point in this respect. In the first mentioned case, where it was held that funds had been converted by the trustee, he contended it to be the law that he could restore the fund out of his own funds, and the court held that there was no such allegation covering any such supposed state of facts. In the last mentioned case, a decree set aside a sheriff's deed upon the ground that the transcript upon which the execution was issued was defective, but the decree was not sustained, because the bill made no charge that the transcript was defective, but charged that the entire proceeding was a fraudulent conspiracy, which the decree found was not established by the proof.

The Nature of the Bill.

The appellants, in discussing the nature of the bill, contend that it is not one for accounting and does not partake of the nature of a bill to enforce a mechanic's lien. It is submitted that the bill is one for an accounting of the fund received by the defendant trustees, and wrongfully paid out by them, and further, to subject the same to payment and satisfaction of mechanics' liens, as shown in prayer 2 of the bill (R. 10). Furthermore, prayer 2 of the said bill shows that the appellees were not certain of the amount of the fund, and as a matter of fact it was in the sum of \$1180.76 instead of the figure of \$1186.70 stated in the bill. Contrary to statement in appellants' brief, each sum due each lien claimant was not easily ascertainable, since each of them would have to prove their liens, and the funds revealed as available would thereupon be prorated among those who established their claims.

Appellants contend that when the bill was filed plaintiffs alleged that the trust of the appellants had been terminated. Such statement is contrary to the record in this case.

An examination of the authorities cited by the appellants in this regard, it is believed, shows that there was sufficient ground for an accounting by a court of equity. 1 R. C. L. 223, relied upon by appellants, states, at par. 25:

“Equity will not take jurisdiction in matters of account which are not complicated *where there is no other ground for equitable jurisdiction* (Italics ours), and the reason for this is said to be that if equity were to assume jurisdiction there would be an end to the action of assumpsit in every instance where there had been a single payment on the part of the defendant, did the creditor choose to proceed in equity”

and again at par. 26:

“An accounting may be had in equity as an incident to the main relief granted, * * *.”

In the case of Phillips v. Phillips, 9 Hare 471, 473, 68 Eng. Rep. 596, cited by appellants, the principal sued his agent for an account of moneys received by the defendant.

In Coffman v. Sangston, 21 Gratt. 263, 269, cited by appellants, the court said at p. 272:

“In this case it is true the bill contains no specific allegations as to the amount collected by the defendant; but an account was taken; the certainty requisite to a proper decree was afforded by the proofs; and the defendant rendered liable for the amount ascertained to be due. In any aspect of the case, it does not appear that any injus-

tice has been done him. For these reasons, I am of opinion the decree should be affirmed.”

The appellants cite the case of *Anderson v. Watson*, 141 Md. 217, 234. In this case employees of a coal mining company filed a bill against the company in connection with their claim for compensation to be computed upon the weight of coal mined. The court, at p. 233, concedes that:

“The jurisdiction of a court of equity in matters of account extends to cases where * * * there are * * * difficulties in the way of an adequate remedy at law.”

Appellants cite 4 Pomeroy's *Eq. Jurispr.* (2 ed.), p. 3370, n. 3. In that volume, at p. 3368, the statements appear:

“Extent of the Equitable Jurisdiction—When exercised.

“The facts of each particular case should govern, and if it is doubtful whether adequate relief could be obtained at law, equity should entertain jurisdiction.

“When the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law.”

and at p. 3372:

“The remedy of accounting is in most instances a necessary incident and part of the relief granted in suits brought by those beneficially interested, against trustees, either express or implied, * * *.”

Upon the question of preventing a multiplicity of suits, appellants cite 10 R. C. L. 284, Sec. 28. They

apparently rely instead upon Sec. 29, which latter section simply states a majority view that jurisdiction in equity will not be entertained simply upon the ground of preventing multiplicity of suits, and the person seeking to come into equity "must himself have an equity". Sec. 18 of this volume, at p. 275, states:

"To oust a court of equity of jurisdiction, however, it is not sufficient that there is a remedy at law, but it must be a plain, adequate and efficient remedy."

In the case of Nashville etc. R. Co. vs. Jenkins, 155 Tenn. 605, 296 S. W. 1, 53 A. L. R. 812, cited by appellants, the court held that equity will not entertain a bill to recover damages for the unlawful cutting of timber on the ground of an accounting.

Appellants cite the case of Church v. Holmes, 60 App. D. C. 27, upon this question of the right to proceed in equity. This case, it is submitted, on the merits, is practically on all fours with the instant one and will hereinafter be discussed fully. It is sufficient to say at this time on this particular point that in that case the action was founded upon a judgment of our Municipal Court as a second lien upon the property sold by the trustees, and the claim had thus been fully proved, as distinguished from a mechanic's lien, which, while of equal dignity as a lien upon the property, had to be proved in due course. There were no complications in that case about parties. This Court, at p. 30, finds that the action *may be* in assumpsit, and cites Webster v. Singley, 53 Ala., 208, which involved the right of a junior mortgagee, upon a sale of the real estate, to the surplus after satisfaction of the prior mortgage.

See *Butler Bros. Shoe Co. vs. U. S. Rubber Co.*, 156 Fed. 1, 21, where the court said on p. 21:

“The adequate remedy at law which will deprive a federal court of jurisdiction in equity must be as certain, practical, prompt, efficient, and complete as the remedy in equity. (Citing cases) * * * To obtain such relief at law an action of replevin and of assumpsit against the defendant, and an action against the bank, would have been necessary, and the remedy by two or three actions at law might not have been as prompt and efficient as a single suit in equity.”

It should be noted here that no suit at law would have served the appellees' purpose, or been proper, and this is clearly evidenced by an examination of the decree (R. 26-28), where pro confessor is made final against the defendants, Meyer and Stauffer, as well as against two of the lienors, where the bill of complaint is dismissed, as to the plaintiffs, Atwood and Rupprecht, and where judgment is entered for the appellees against Roth and Sweeney, as well as against the defendants, Meyer and Stauffer.

Only a court of equity could have brought all of these parties before it in one proceeding and thus satisfactorily disposed of all of the questions in controversy affecting all of the parties, and a court of equity could require trustees to account for the funds misapplied by them, receive proof of the liens established, and require the trustees to make good by way of surcharge against them individually the fund improperly applied by them. Where the right is equitable, rather than legal, the owner of the equitable title may maintain a suit in equity to enforce his equitable right, as his remedy is not one at law. *Union Stock Yards National*

Bank v. Gillespie, 137 U. S. 411, 34 L. Ed. 724. See also Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183, where the court says, at page 479:

“All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. * * * The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity.”

On page 16 of their brief, the appellants again say that the plaintiff admitted in the lower court that if Eisinger Company and Sabatini could not have enforced a mechanic's lien, neither was entitled to relief. It should again be noted that this statement is not supported by anything in the record.

The cases cited by appellants in support of their contention that the bill was objectionable as one in the nature of a bill to enforce a mechanic's lien are inapplicable.

In Lambie Co. vs. Bigelow, 34 App. D. C. 49, 55, it appeared that when the notices of liens were filed by subcontractors, the contract between the owner and contractors had been terminated, and a sum considerably in excess of the amount due thereunder had been paid said contractors.

In Heitz v. Sayers, 1 W. W. Harr (Del.) 221, 113 Atl. 901, it was held that the lien claimant had not made affidavit to the truth and correctness of the claim, his affidavit being simply upon information and belief, contrary to the requirements of the statute.

In Cronin v. Tatge, 281 Ill. 336, 118 N. E. 35, it was held that there was no lien for paving a street in front of a lot, by private contract and for other work in the street, but not connected with the lot.

In *Armstrong v. Obucino*, 300 Ill. 140, 133 N. E. 58, the sale in connection with enforcement of a mechanic's lien was declared void, because made before the expiration of the period of redemption, allowed by the amendment to the statute, which amendment prohibited a sale until after the redemption period.

Internat'l. etc. Co. vs. Kensington, etc. Co., 215 Mich. 178, 183 N. W. 793, does not support the appellants' contentions, except it concedes the right to enforce mechanics' liens to be statutory, but holds that the statute was not violated and in fact states at p. 184 that:

“the overwhelming weight of authority is that in the absence of fraud the lien is not lost because the description embraces more land than is properly subject to the lien.”

The appellants state that there can be no mechanic's lien on personalty, and cite *Haeussler v. Mo. Glass Co.*, 52 Mo. 452. That case simply held that a mechanic's lien did not attach to certain personal property, which, although used in the manufacturing of glass, did not become a part of the realty so as to be subject to the mechanic's lien. There the property involved never was real estate, whereas appellees here had a mechanic's lien against the real estate and thereafter a lien upon the net proceeds of its sale, as retaining the character of real estate. The fallacy of appellants' objection to the bill as one in the nature of a bill to enforce a mechanic's lien is emphasized by the contentions at the bottom of pages 16-17 of their brief, where they state that appellees did not ask that the real estate be sold. The bill is in the nature of a bill to enforce a mechanic's lien because the right or claim by lien arose out of the mechanic's lien statute.

Plaintiff's Case.

For the purpose of convenience, we shall hereinafter refer to the appellee, Eisinger Mill and Lumber Company, Inc., as the plaintiff.

Plaintiff was entitled to a lien for labor and materials furnished Lot 50, in Square 1740, improved by premises No. 5204 41st Street, N. W. (R. 23, 24)

Sec. 351, c. 11, Title 25, of the D. C. Code:

“Every building erected, improved, added to, or repaired by the owner or his agent, and the lot of ground on which the same is erected, * * * shall be subject to a lien in favor of the contractor with such owner * * * for the contract price * * * or * * * for the reasonable value of the work and materials * * *: *Provided*, That the person claiming the lien shall file the notice herein prescribed.”

The plaintiff duly preserved its lien by filing (Sec. 352, D. C. Code):

“* * * a notice of his intention to hold a lien on the property hereby declared liable to such lien * * * specifically setting forth the amount claimed, the name of the party against whose interests a lien is claimed, and a description of the property to be charged, * * *”. (R. 13, 23, 24)

The ensuing sections of the D. C. Code, under the chapter on liens, all speak of “the lien”, and not as any claim to a lien, but as a definitely subsisting right. Sec. 359, provides that:

“The lien hereby given shall be preferred to all judgments, mortgages, deeds of trusts, liens, and incumbrances which shall attach upon the building or ground affected by said lien subsequently to the commencement of the work upon the building, * * *.”

Sec. 360 provides that:

“The proceeding to enforce the lien hereby given shall be a bill in equity, which shall contain a brief statement of the contract on which the claim is founded, * * * and shall pray that the premises be sold and the proceeds of sale applied to the satisfaction of the lien. * * *”

Section 365 provides that:

“Any person entitled to a lien, as aforesaid, may commence his suit to enforce the same at any time within a year from and after the filing of the notice aforesaid or within six months from the completion of the building or repairs aforesaid, on his failure to do which the said lien shall cease to exist, unless his said claim be not due at the expiration of said periods, in which case the action must be commenced within three months after the said claim shall have become due.”

It is submitted that the foregoing D. C. Code sections, as well as all of the other sections of this c. 11 on liens, unqualifiedly recognize the efficacy and dignity of a mechanic's lien, prior to the filing of either the notice of lien or of the suit to enforce the same. The lien is definitely given by the statute for the protection of the contractor or materialman, and is a right which arises prior to and independently of any step to preserve the same, and all that is necessary for its preservation is that the steps marked out and required by the foregoing sections of the statute, shall be taken within the respective times specified.

In the case of William Whelan, et al. v. Catherine V. Young, et al., 21 D. C. Rpts. 51, decided June 27, 1892, the Court in its opinion, after discussing the provisions of our then statute giving the right of mechanic's lien,

with particular reference to the rights of subcontractors, said, on pp. 56-57:

“Now, our statute does not in terms declare that these liens shall operate from the commencement of the work. It does so, in effect, in a certain class of cases, by providing that these liens shall be preferred to all judgments, mortgages, deeds of trust, liens and incumbrances attaching subsequently to the commencement of the work. As against these, the liens do operate from the commencement of the work and have a retroactive preference and priority. The owner is forewarned that these liens may be filed at any time up to three months after the completion of the work and he shall not be allowed to forestall them by incumbering the property in the meanwhile.”

See also 40 C. J., par. 201, p. 175:

“The filing of the instrument is necessary to establish, perfect, preserve, and enforce the lien; but, according to the weight of authority, the filing of the claim does not create the lien or fix the time when it attaches; the lien is created and the right thereto arises on the doing of the work or the furnishing of the materials or the performance of such other act as is specified by the statute, and, on the perfection of the lien by the filing of the claim, it relates back to the date of such act so as to take effect as of that date. The filing of the claim does not constitute the lien or the foundation of the lien.”

And par. 327, pp. 264-265:

“According to the majority view, the filing of the claim does not create the lien, but merely perfects, preserves, or perpetuates it. Likewise, the attaching of the lien is not postponed until the commencement of an action or proceeding to en-

force it, the institution of the action not creating the lien but merely perpetuating it and keeping it intact.”

The plaintiff, Eisinger Mill and Lumber Company, Inc., filed its notice of lien on time, and within the three months' period specified, and the property upon which the lien was charged was sold by the appellants, Roth and Sweeney, as trustees, under a second deed of trust thereon, before the expiration of the time allowed the plaintiff within which to commence its suit to enforce its lien, but it nevertheless filed its bill in equity within the statutory period of one year allowed the plaintiff within which to enforce its lien, to realize upon the lien and enforce the same by subjecting thereto the net proceeds of sale in the hands of the trustees, after satisfaction of the second trust, praying that the trustees be required to account for the fund wrongfully paid over by them to Meyer & Stauffer. It is thus contended that so long as the lien was properly preserved, as was done in this case, it took its place as a lien charge or burden upon the real estate, and the trustees holding this surplus fund, after satisfaction of the debt secured by the second trust under which they were acting, could take no hurdles, and, with actual, as well as constructive, notice of junior charges of record against the property, must regard the surplus fund as available for satisfaction of, and bound by, the next subordinate liens or encumbrances, in the order of priority. As bearing upon the order of priority, see 40 C. J., par. 354, p. 283:

“The fact that a judgment at law has been entered upon a lien gives it no priority in payment or advantage over liens upon which a judgment has not been rendered. Neither can a claimant

who has not preserved his lien in the manner required by statute obtain priority over other claimants, who have preserved their liens under the statute, by resorting to attachment proceedings and obtaining judgment on his claim.”

and par. 361, p. 286:

“An attachment is prior to a mechanic’s lien subsequently accruing, but an attachment subsequent to the accrual of a mechanic’s lien is postponed thereto, even though the lien is not perfected until after the attachment. Where the priority in point of time of liens on a fund is first a mechanic’s lien, then an attachment, followed by other mechanics’ liens, the first mechanic’s lien will not be shifted to money subsequently becoming due, in order to help the attaching creditor, where to do so, would practically cut off the subsequent mechanics’ liens.”

The decision by this Court in the case of *W. A. H. Church, Inc. v. Holmes, et al.*, 60 App. D. C. 27, clearly supports the position of the appellees. The situation there was almost identical with ours, except that the junior lienor was a judgment creditor instead of a mechanic lienor, but it is submitted that there is no distinction between the two positions, both being valid liens upon the property. The opinion of the Court states at p. 28 that the defendants, as trustees, foreclosed the trust, and, after paying expenses of sale, paid the surplus in their hands to the grantor in spite of the judgment of record against the property at the time of the sale. The court says at pp. 29-30:

“The trustees, under a deed of trust, occupy a dual relation. They represent primarily the mortgagee to the extent of satisfying the mortgage, and, in case of sale, conveying the property to the

purchaser. They are likewise trustees for the mortgagor or owner of the equity of redemption, as to any surplus derived from the sale above the amount necessary to satisfy the claim of the mortgagee. *Dennett v. Perkins*, 214 Mass. 449, 101 N.E. 994. They are, therefore, custodians of the fund and bound to apply it properly, and are liable to the person or persons entitled thereto, and, where they fail to properly apply the funds, they are liable to the person damaged by such failure. *Hayes v. Woods*, 72 Ala. 92; *Webster v. Singley*, 53 Ala. 208, 25 Am. Rep. 609; *Atkinson v. Foote*, 44 Cal. App. 149, 186 P. 831; *Millard v. Truax*, 50 Mich. 343, 15 N. W. 501; *Kleinman v. Neubert*, 142 Minn. 424, 172 N. W. 315.

* * * * *

“Plaintiff’s judgment was a second lien against the property of Jackson. When the first lien secured by the deed of trust was satisfied, the trustees were no longer trustees for the mortgagee, but they became trustees for the mortgagor, as to the surplus left over or the equity of redemption, which immediately became subject to the claims of junior mortgagors, judgment or lien creditors, of which, in the present case, plaintiff was the only one. The duty of a mortgagee or trustee, in such a case, is clearly stated in *Markey et al. v. Langley et al.*, 92 U. S. 142, 155, 23 L. Ed. 701, as follows:

‘A mortgagee, in such circumstances, is a trustee for the benefit of all concerned. He must regard the interests of others as well as his own. He should seek to promote the common welfare. If he does this, and keeps within the scope of his authority, a court of equity will in no wise hold him responsible for mere errors of judgment, if they have occurred, or for results, however unfortunate, which he could not reasonably have anticipated. *Hext v. Porcher*, 1 Strob. Eq. (S. C.) 172.

‘The second proposition is also untenable. The liens of the mortgages and the mechanics’ lien attached to the proceeds of the sales in the same manner, in the same order, and with the same effect, as they bound the premises before the sales were made. *Astor v. Miller et al.*, 2 Paige (N. Y.) 68; *Sweet v. Jacocks*, 6 Paige (N. Y.) 355 (31 Am. Dec. 252); *Brown v. Stewart*, 1 Md. Ch. 87; *Olcott v. Bynum*, 17 Wall. 63 (21 L. Ed. 570). * * * The fact that the sale was made by the mortgagees, acting as trustees and performing the functions of a master, does not change the principle involved, nor affect its application.’

* * * * *

“While the trust deed purported to recite the duties of the trustees, they could not escape any obligation which, in the same conditions, would rest upon a mortgagee, since they assumed the same trust obligations in accepting the trust that would be imposed upon the mortgagee. We think it well settled that a mortgagee foreclosing a mortgage in his favor must satisfy subordinate mortgages, judgments, or liens against the property, from the surplus in his possession before turning any of the surplus over to the mortgagor.”

The Church case also definitely establishes the law for the District of Columbia, that constructive notice to the trustees is sufficient.

The appellees also cite the following in support of their contentions:

41 C. J. 1015 (Referring To The Disposition of The Surplus Proceeds of Sale Remaining After Paying The Mortgage Debt, etc.):

“The surplus in any given case may be treated as personalty or realty, as justice and equity re-

quire, in order to protect the rights of persons interested in the fund.” (*Schiavino v. Salzillo*, 45 R. I. 203, 121 A 423.)

And again at par. 1475, on p. 1015, 41 C. J.:

“Where a surplus remains after satisfying the mortgage or deed of trust under which the sale is made, together with costs and commissions, it is generally held that it should be applied to the payment of the claims of a junior mortgagee, and that the fund should be retained by the trustee or mortgagee until the rights of such claimants are determined.” (*Hayes v. Woods*, 72 Ala. 92; *Yarborough v. Wise*, 5 Ala. 292; *O'Reilly v. Hendricks*, 10 Miss. 388; *Mead v. McLaughlin*, 42 Mo. 198; *Bleeker v. Graham*, 2 Edw. (N. Y.) 647.)

See also *LaCentra v. Jackson*, 245 Mass. 14, 139 N. E. 429.

This was a bill in equity seeking to enforce a mechanic's lien and to require payment thereof to the plaintiff, either from a surplus realized from the sale of the premises under the provisions of a first mortgage, or from a bond given in this suit to dissolve the plaintiff's lien. The plaintiff had complied with the statutory requirements with reference to establishing his lien. The Court in its opinion on p. 18, says:

“The foreclosure of the first mortgage did not operate to discharge the incumbrance of the lien, but in equity it attached to the proceeds of the sale over the amount due on the mortgage and expenses of sale; the surplus remaining stood in the place of the property, and could be reached and applied in payment of the amount of the lien found to be due, unless and until a valid bond had been approved and filed discharging the lien. (*Wiggin v. Heywood*, 118 Mass. 514; *Knowles v. Sullivan*, 182 Mass. 318, 65 N. E. 389; *Maguire v. Spaulding*,

194 Mass. 601, 80 N. E. 587; *Stockbridge v. Mixer*, 215 Mass. 415, 102 N. E. 646.) As the lien was not discharged by foreclosure of the mortgage, the question remains, whether it was discharged by the approval and filing of the bond.”

And on pp. 19-20:

“It follows that the incumbrance of the lien was not dissolved in equity by foreclosure of the mortgage, but was discharged by the bond; * * * A decree is to be entered in favor of the plaintiff establishing his lien for the amount found due.”

41 C. J. 1016:

“Where there is more than one subsequent encumbrance they should be discharged in their respective order, and directions or representations of the mortgagor indicating a disposition of the fund different from that which the law points out cannot be given effect.”

41 C. J. 1018:

“Where there are conflicting claims to the fund the mortgagee may, in some jurisdictions, relieve himself from liability by paying the money into court or to the proper officer.”

See also *Barrett v. Barnes*, 186 N. C. 155.

In the case of *Knowles v. Sullivan*, 182 Mass. 318, the land was sold at a foreclosure sale by a mortgagee. The holder of a mechanic's lien, subsequent to the mortgage, sued the mortgagee for money had and received to recover the surplus after the mortgage was satisfied. Chief Justice Holmes, in his opinion, said, at p. 319:

“The land having been sold under the paramount title of the mortgagee, the lienholder's

claim is regarded by equity as transferred to the surplus proceeds. (Citing cases) The defendant is not in the position of a mortgagee who had paid over the fund without notice of the claim, * * * Therefore, if the plaintiff can recover without joining his partner in the lien, there seems to be no objection to his recovering in an action for money had and received. * * *

18 R. C. L. 945, par. 82:

“The question of the time of the accrual or commencement of a mechanic’s lien is one particularly dependent on the language of the statutes, and consequently the time may shift in the same jurisdiction by changes made in the statutory provisions. In some states the right to a lien attaches at the date of the contract for the improvement, while in others it attaches at the commencement of work on the improvement, or at the time when labor is begun and the first materials are furnished. Until the lien is fixed by filing or giving the notice, there is merely a right to a lien attached, or as it is sometimes said the lien remains inchoate, but when the notice of lien is filed or given as required by the statute, the lien as a whole relates back to and dates from the time the right accrued under the statute as above stated. * * * In a few jurisdictions a mechanic’s lien does not attach until it is actually filed or served.”

and again on p. 953:

“A lien which attached prior to the date of a judgment is given priority, even in the case of a judgment for purchase money rendered after legal title is in the defendant, unless such judgment was entered at the same time the deed was delivered, or so near to it as to make the entry of judgment and the conveyance one transaction.”

18 R. C. L. 955-956, par. 94, citing Grants Pass Trust Co. v. Enterprise Min. Co., 58 Ore. 174, 113 Pac. 859, 34 L. R. A. (N. S.) 395. 19 R. C. L. 664:

“The rights of conflicting claimants to a fund in court, being the surplus resulting from sale of mortgaged property, may be settled by a reference to the master, or by directing a bill to be filed; * * *. Surplus moneys arising from a foreclosure sale, while remaining in the hands of the sheriff, or under control of the court, belong to subsequent lienholders in the order of priority, and should be so disposed of by the court; * * *.”

Jones on Mortgages, Vol. 3, par. 2482, p. 1034:

“It may happen that on account of adverse claims, or on account of the absence or death of the mortgagor or other person entitled to the surplus, that much time may elapse before payment of the surplus can be made, in which case it is advisable either to pay the money into court, or to safely invest it as a trust fund pending the settlement of the question to whom it shall be paid, or the appearance of the rightful claimant.”

And par. 2483, pp. 1035, 1036:

“* * * The surplus remaining after satisfying liens and the costs and expenses of sale belongs to the mortgagor, * * *.”

And at p. 1040:

“All the cases recognize the doctrine that the surplus is equitable real estate, and should go to the persons who would be entitled to the equity of redemption. They differ as to the mode in which the parties in interest shall obtain their rights, rather than as to the rights themselves.”

Further Answer to Appellants' Discussion of Plaintiff's Case.

Appellants contend on page 17 of their brief that the plaintiff, Eisinger Company, conceded that its case depended solely on the validity of its notice of lien. This statement is not supported by the record.

Appellants discuss the manner of filing notices of mechanic's lien where there are two or more adjoining and attached buildings erected and owned by the same persons, as in this case, and the matter of proof in connection therewith, as to what work or material was furnished for the respective houses on the respective lots. It is submitted that this entire question is taken care of by Sec. 364, of c. 11, of Title 25, of the D. C. Code, which reads as follows:

“Several buildings.—In case of labor done or materials furnished for the erection or repair of two or more buildings joined together and owned by the same person or persons, it shall not be necessary to determine the amount of work done or materials furnished for each separate building, but only the aggregate amount upon all the buildings so joined, and the decree may be for the sale of all the buildings and the land on which they are erected as one building, or they may be sold separately if it shall seem best to the court. (Mar. 3, 1901, 31 Stat. 1386, c. 854, sec. 1250.)”

The statute clearly contemplates the sale of the buildings separately. The record fails to show that the contract was split up by the Eisinger Company so as to become two contracts, nor does the record show that the defendant trustees were in any way affected by the situation or in any way relied upon the question of how many notices were filed, and in what amounts. This

would be a matter for the owners of the property against whom pro confessos have been taken, and who have not seen fit to raise the question. The trustees could have no better rights than the mortgagor owners, and were only concerned, according to their answer (R. 14-18) and the evidence (R. 32-33), as to whether they could disregard all of these liens in the absence of other legal restraint upon them. The foregoing Sec. 364 of the Code (formerly Section 1250) was fully discussed and considered in the case of Alfred Richards Brick Co. v. Trott, 23 D. C. App. 284, where the court, on p. 293. expressly refers to the case of Phillips v. Gilbert, 101 U. S. 721, cited by the appellants, saying:

“The case of Phillips v. Gilbert, 101 U. S. 721, 25 L. ed. 833, is not antagonistic to what we here hold. That case arose under the old mechanics’ lien law of this District, which contained nothing analogous to sec. 1250 of the present Code. But the Supreme Court of the United States, notwithstanding this, held that one single lien could be maintained for a whole row of houses joined together, because the claim arose under one entire contract and related to the row as an entirety.”

And on p. 295, says:

“And it may be, also, that two or more groups of houses may be held under one lien against all, as against the owner alone, when there are no others interested. * * * Of course, by anything that has here been said, we are not to be understood as intimating that two or more distinct and separate notices of lien may not be comprised in one single instrument of writing or that two or more notices of lien may not be enforced in one and the same proceeding in equity where the parties may be the same.”

It may here be pointed out that appellants are in error when they reach the conclusion in their brief that the Court held in the Phillips v. Gilbert case that liens could not be filed against the individual lots. The appellees did not divide the contracts and make them apply to the particular buildings separately, as claimed by appellants in their brief. They simply filed separate notices of liens upon both properties (R. 32, 33). For this reason the case of Orr v. Fuller, 172 Mass. 597 (52 N. E. 1091), cited by the appellants, does not apply and is not in point, and incidentally it only established that the claim need not be divided—and not that it could not be divided, as stated by appellants herein. That case, and the case of Bastrup v. Prendergast, 179 Ill. 553 (53 N. E. 995), next cited by the appellants, simply support the position of the appellees with respect to the aforesaid Sec. 364 of the D. C. Code.

Appellants cite the case of Brick Co. v. Johnson & Co., 3 Pa. Super. Ct. 220. But that case is easily distinguishable from our case, as shown by the appellants' discussion and quotation. There there was one contract to furnish and deliver all brick for 65 houses. There was a balance of \$9,315 due the contractor, and it filed two mechanics' liens, one against 45 of the buildings named in the contract, for \$5,675, and one against 20 buildings, for \$3,640. Johnson had subsequently become the owner of three of the buildings named in one of the lien notices, and the affidavit of defense alleged that two apportioned liens had been filed against parts of one entire block.

We have no fault to find with the case of West v. Dreher, 73 Ind. App. 133 (126 N. E. 688), cited by appellants, where the filing of one notice of lien on two houses erected on contiguous lots was held to be sufficient.

We feel that the case of *Sergeant v. Denby*, 87 Va. 206 (12 S. E. 402), cited by the appellants supports our position.

In the case of *Stoltze v. Hurd*, 20 N. D. 412 (128 N. W. 115), cited by the appellants, there was only one building on the two adjoining lots which were owned by two different persons, the plaintiff was a subcontractor, and there were several defendants, at least two of whom were third parties who would have been prejudiced by the waiver of lien upon one of the lots and the continuance of the lien upon the other.

In the case of *Miller v. Shepard*, 50 Minn. 268 (52 N. W. 894), there was a barn on contiguous lots, and it was attempted to apportion the claim of \$424 in equal shares to each owner.

As to any releasing of lien on Lot 50, the release did not even purport to cover the premises on such lot, and, as shown by the findings of fact (R. 25), the lower court expressly decided: "That said plaintiff, Eisinger Mill and Lumber Company, Inc., thereupon, and while the aforesaid fund of \$1180.76 was in the hands of the said defendant trustees, notified each of them of its aforesaid claim by lien, first upon the aforesaid real estate (referring to Lot 50, in Square 1740, and the improvements thereon known as No. 5204—41st Street, N. W.) and thereafter, upon the net proceeds, arising from said sale, amounting to the said sum of \$1180.76, which said lien was at said time valid and outstanding and unreleased." (Parenthesis ours) It may be noted here that the record does not give, or purport to give, the substance of all the testimony bearing upon the findings of fact.

The appellants concede, for the sake of argument, that the release of liens applies to Lot 49, and discuss several cases as bearing upon the question of the effect

of such release. We submit that the answer to all of these is the aforesaid Sec. 364 of the D. C. Code, which covers the matter of work and material furnished for two or more buildings joined together and owned by the same person or persons.

In *Wilson v. Wilson*, 51 Md. 159, cited by appellants, there was a bill filed to enforce a lien for materials alleged to have been furnished for four houses on Lexington Street in Baltimore, Maryland. All of these houses had been sold by the builder to various persons prior to the filing of the lien. No. 601 was the last house finished, and as to this a release of lien for materials had been given, and the court was unable to find the delivery of any materials for the other houses sought to be affected by a lien within six months before the claim for a lien was filed.

In *Nickel v. Blanch*, 67 Md. 456 (10 Atl. 234), cited by appellants, there were 15 houses involved, some on Broadway, and some on St. Joseph Street. The lien claim, as filed, was against one of the buildings on Broadway. There was an agreed statement of facts in the record which showed that all of the paving brick furnished within six months prior to the filing of the lien claim, were delivered at, and used for, the houses on St. Joseph, Street, and not for the special use of the house against which the lien claim was filed. These were two separate groups of houses and the rights of other interests had intervened.

The case of *Golrick v. Tella*, 22 R. I. 281, 282, 47 Atl. 598, cited by appellants, is not in point, because there the materialman who was attempting to enforce a lien had executed a release thereof to the owner for the purpose of enabling the contractor to obtain a payment upon the contract.

The case of *Brown v. Williams, et al.*, 120 Pa. 24 (13 Atl. 519), cited by appellants, does not apply, for the reason that the release of liens was held by the Court to include and apply to work claimed for and done after the execution of the release.

The case of *Reilly v. Williams*, 47 Minn. 590, should be a sufficient answer to the appellants' contentions concerning the effect of any release of liens upon Lot 49. In that case there were two contiguous lots, subject to a first mortgage to the defendant insurance company, and a second purchase money mortgage. Jackson contracted to furnish material and labor for two houses, one on each lot, for Williams (the purchaser). He commenced the erection of the houses under the contract. The mortgages were put on and Williams conveyed the properties back to his vendor (Berryhill). Jackson, without knowledge of the reconveyance, continued under the contract with Williams. The house on one of the lots being then completed, Jackson, at the request of Williams, released that lot from any and all claims held thereon by him, agreeing that he should retain his lien upon the other house and lot for the balance due him on the contract and extra work. Neither Berryhill nor the insurance company were consulted upon or agreed to this arrangement. Jackson completed the other house and filed a lien thereon (house and lot) for the balance due on the contract which was considerably less than one-half of the contract price for the two houses. The court, in its opinion, on pp. 593-594, said:

“The main contention of the defendants is that, as the contract for the building of the two houses was an entirety, and treated the two lots as one tract, therefore, Jackson had a single indivisible

lien on both lots for the building of both houses, and consequently that (1) the lien-statement was bad because it was only against one lot; and (2) that the release of one of the lots from the lien operated as a release of both * * * in the present case the plans of the two houses were exactly alike, each requiring the same amount and character of labor and material; consequently there was no difficulty in apportioning, if necessary, the amount of the entire lien between the two. And as between Jackson and Williams, at least, there was no more objection to the release of one lot, and still retaining and enforcing a lien for the whole amount due on the contract against the other, than there would be to a mortgagee's releasing part of the mortgaged premises, and still enforcing his lien on the remainder for the entire amount of the debt. Neither can Berryhill or the insurance company complain of this, unless it appears that they have been prejudiced by it, of which there is not a particle of evidence. Had it appeared, for example, that the lot released was worth more than the amount of the mortgages on it, which, if applied on Jackson's lien, would, by reducing the burden on the other lot, have reduced or prevented a deficiency of value in the other lot to satisfy the encumbrances on it, the defendants might have had reason to complain; but, so far as appears, what they lose on one lot, they have gained on the other. What has been said on these points fully covers and disposes of the contention that, at most, only half of the amount due on the building contract should be charged as a lien upon the lot in controversy."

The record does not show that the appellants were in any way prejudiced by the release of lien on the other property, or that it influenced their conduct.

Appellants cite the case of Yawkey-Crowley L. Co. vs. Acker, 194 Wis. 504, 217 N. W. 313, where the

owner of two pieces of property subject to liens had falsely represented to the plaintiff that the lot released was where he lived, whereas the release actually covered the other property which was subject to a much larger lien claim. The property thus released was sold to an innocent purchaser.

In the case of *Stockwell v. Holt*, 48 Idaho, 176, 178 (279 Pac. 629), cited by the appellants, the plaintiff had signed a release of lien and testified that when he read and signed the instrument the second paragraph thereof had not been incorporated, but the Court held, in its opinion, on pp. 177-178, that: "It was physically and legally impossible for plaintiff to have signed whatever he actually did sign, through a mistake."

Appellants contend that the appellees exaggerated their lien claims by the filing of separate lien notices on the two properties, and they, themselves then attempt to estimate the amount of the appellees' liens on Lot 50. As bearing on this point they cite the case of *Aeschliman vs. Presbyterian Hosp.*, 165 N. Y. 296 (59 N. E. 148), and their quotations show the case to be not in point, because there the lien claimant had made statements that were willfully and intentionally false, and the court says at p. 300:

"that this was done intentionally by pretense of a fictitious contract for the purpose of enforcing a false and fabricated demand, and held that the plaintiffs thereby forfeited their right to recover against the sureties and directed a judgment in their favor."

The record fails to show that anything of this kind was alleged or proved against the appellees.

The case of *Edgar v. Salisbury*, 17 Mo. 271, cited by the appellants, does not apply. The Court says at p. 273:

“But when he charges a single sum for different services, and any of them are of a character for which the law would give no lien, he cannot proceed under the statute, because he has filed no proper account and because it is impossible to ascertain the amount of his lien from the account filed.”

The lower court has found that the *Eisinger Company* and *Sabatini* sufficiently proved their respective liens (R. 23-24).

Appellants cite the case of *Nelson v. Withrow*, 14 Mo. App. 270, 277, which is not in point, because the lien claim was for carpenter work furnished, and the evidence disclosed that it was also for superintending, for which the law gave no lien.

The defendant trustees never questioned in their answer the character of the notices of liens or objected thereto, and the record does not show any claim on their part that they would have acted other than they did in this case, had any other or different notices been filed, or that they have been injured in any way because of the lien notices. The defendants were not required to decide concerning the validity of the liens, and they could have let the court decide, as it has now done.

Defendants' Case.

Appellants contend that they were bound by the deed of trust instrument under which they were acting to turn the surplus over to the mortgagors.

Such a rule would permit a record owner of property to work gross fraud upon subordinate mortgagees and mechanic lienors. The real estate might be worth \$50,000, subject to a first trust of \$1,000, and also to a second trust and substantial mechanics' liens aggregating a sum far in excess of the amount of the first trust; the second trust might not be due and the time might not have expired for the mechanic lienors to proceed in equity to enforce their claims. If the rule contended for by the appellants could be invoked, then, by arrangement between the owner of the property and the holder of the first trust, the property might be sold at foreclosure, and, bringing substantially more than the amount of the first trust, the trustees thereof could turn the surplus, after satisfaction of the first trust, over to the owner without regard to the junior encumbrances.

It is conceded that appellants' quotation from 3 Pomeroy's Eq. Jurisp. (4 ed.) sec. 1062, is a general statement of the law relating to express trusts, but this section 1062 on p. 2427 also contains the statement that: "If the fiduciary relation is established by law and regulated by settled legal rules, then these legal rules must constantly guide and restrain the conduct of the one who occupies the relation."

Appellants argue that the express trust, created by the deed of trust, once completed, could not be revoked, citing 1 Perry on Trusts (7th ed.), Sec. 104; but it is difficult to see upon what theory the defendant trustees' recognition of these lien claims, in fulfillment of their legal duty, could be construed as an attempted revocation of the trust.

Appellants also argue that the defendant trustees fulfilled their duty when taking the position that the

lienors would have to protect their rights by appropriate action in the courts, but it is submitted that the law protected the appellees, who held duly preserved liens, and that they had a right to assume that the trustees would properly perform their duty by holding the fund until the determination of the controversies, but, instead, the trustees, with full notice of the claims, not only constructive but also actual, and in defiance thereof, turned the fund over to the mortgagors, Meyer and Stauffer, within two days after receipt of the same.

The cases cited by appellant as giving the appellees the right to proceed by garnishment or attachment, are not in point and do not support their position, as is apparent from a reading of the syllabus of each case.

The appellants inquire as to what claims the trustees should have paid and who was entitled to be paid. If they were unwilling to recognize the liens, or were in doubt as to their duty, they could have submitted the matter to the court by interpleader. The doors of a court of equity are always open for the relief, aid and guidance of trustees. Appellants argue that they could not disburse the money until a determination as to the validity of the liens and the questions of law and fact had to be decided. As hereinbefore pointed out, they would have been protected in holding the fund so long as the liens were preserved, and all of the questions with which they now claim in their brief to have been confronted while holding the fund could and would have been decided by the court for their protection in due course and within the required time. All of such questions have now been decided by the lower court. The fact remains that the trustees, instead, without seeking the aid of the court, were will-

ing to assume the personal responsibility of turning over the fund, at their peril, and within two days of the receipt thereof, to the mortgagors, when it could reasonably have been assumed by the trustees that the mortgagors were indebted to these lienors for work and materials which went into and enhanced the value of the property sold at foreclosure, in a total sum far in excess of the fund held by the trustees and bound by the liens, and it is difficult to see upon what theory they can now claim the benefit of any equity. It has been established that neither of the trustees was ignorant of the facts, and even if it be conceded that they were ignorant of the law, we do not believe there is any respectable authority today which would excuse them upon that ground.

Perry on Trusts (7th Ed.), Vol. 1, pp. 311-312, sec. 184:

“It is to be observed, however, that the ignorance or mistake which entitles a party to relief must be as to some matter of fact; and that mistake or ignorance of the law, or of the consequences that will follow from the conveyance, will not entitle a party to relief. This rule is established by reason of the great danger of abuse that would arise if parties were allowed to reclaim their property upon allegations that they were ignorant of the law, or mistook the consequences of their acts. Thus, if a party has full knowledge of all the facts, and intends to do the acts or execute the instruments in question in the form in which they are executed, he cannot have relief because he was ignorant of or mistook the law, or because the consequences which legally and naturally follow from the transaction are different from what he expected.”

Roth claims to have first consulted various title officials in the District of Columbia, but the record fails to show, and it is not contended in the appellants' brief, that Roth consulted or employed them as his attorneys in the matter.

Sweeney was equally responsible with Roth, even if it be conceded that he (Sweeney) delegated his office to any extent.

Perry on Trusts (7th Ed.), Vol. 1, pp. 677-678, sec. 402:

“The office of trustee is one of personal confidence, and cannot be delegated. * * * Therefore, if a trustee confides his duties or the trust fund to the care of a stranger (or to a trust company,) or to his attorney, or even to his co-trustee or co-executor, he will be personally responsible.”

Sweeney joined with Roth in turning over the surplus and the record fails to show that he consulted or employed Roth as his attorney. At the time the fund was turned over by the trustees, all of the liens had been preserved and constituted definite lien charges upon the real estate and net proceeds of sale, subject only to prior encumbrances of record, and superior to the rights of the mortgagors, and the bill was filed within the time prescribed by law (R. 25). The appellants contend that none of the cases cited to sustain the opinion in *Church v. Holmes*, *Supra*, affect this case, but an examination of all of them, it is believed, definitely shows that they support the case at Bar, and the record fails to show, and it is not conceded by us, that counsel for appellants showed such cases to be inapplicable to the present case, as claimed on p.

38 of appellants' brief; and the decision of the lower court should lead to a contrary conclusion.

The record in this case shows conclusively that both trustees had full notice of the facts for their consideration before they violated the definitely established rights and lien claims of the appellees, and that such act, in contravention of such rights, does not come within the range of the standard of care and prudence required of trustees. The cases cited by the appellants in this respect deal with the investment of trust funds and give the general rules governing the degree of care and prudence to be exercised by trustees. The history of the appellants' actions, as shown by the record, does not meet those tests. The appellees are certainly innocent persons, but we do not believe it can fairly be said that either Roth or Sweeney have demonstrated in any real degree their innocence in the matter.

CONCLUSION.

We respectfully submit that the judgment of the lower court was correct, and should be affirmed.

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